A **RANJEET SINGH SIDHU & ANOR v. ZAVARCO PLC & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[SUIT NO: 22NCC-179-06-2015]
16 NOVEMBER 2015

B

CIVIL PROCEDURE: *Judgments and orders – Setting aside – Setting aside earlier judgment or order in fresh suit – Fraud or collusion – Whether judgment or order obtained by fraud or collusion could be invalidated – Evidence Act 1950, s. 44*

C ***CIVIL PROCEDURE:*** *Striking out – Action – Double derivative action – Existence of several cause of action – Non-disclosure of any reasonable cause of action after plaintiff filed application for discovery and interrogatories – Whether claim could be struck out*

CIVIL PROCEDURE: *Striking out – Action – Examination on restitutionary* D *remedy at interlocutory stage – Allegation of illegality – Whether trial needed to determine availability of restitutionary remedy – Whether suit ought to be struck out*

CIVIL PROCEDURE: *Striking out – Action – Action against solicitors – Defence of legal privilege – Whether suit could be struck out by reason of legal privilege –* E *Evidence Act 1950, s. 126(1)*

COMPANY LAW: *Derivative action – Fraud on minority – Double derivative action and multiple derivative actions – Interest of justice – Safeguarding interest of company and shareholders – Whether double derivative actions and multiple derivative actions could be filed in Malaysia – Whether necessary in interest of* F *justice to safeguard interest of company and shareholders*

COMPANY LAW: *Derivative action – Double derivative actions – Commencement of common law derivative action in Malaysia against company incorporated in England – Whether permission of English High Court required before filing suit* G *in Malaysia*

COMPANY LAW: *Derivative action – Leave – Leave to commence common law derivative action – Whether leave of Malaysian court required before commencement of a common law derivative suit against Malaysian company*

EVIDENCE: *Judicial notice – Foreign law – Opinions on English law – Judicial* H *notice of opinions on English law – Evidence Act 1950, s. 57(1)(b)*

The plaintiffs were the shareholders of the first defendant ('Zavarco PLC'), a company which was incorporated in the United Kingdom with the then intention of injecting the entire second defendant ('Zavarco Bhd') and its I subsidiaries into Zavarco PLC. As the plaintiffs were only shareholders in Zavarco PLC and since Zavarco PLC was the parent company of Zavarco Bhd, the plaintiffs had commenced a double derivative action, for the benefit

of both Zavarco PLC and Zavarco Bhd, against all the defendants, among others, the directors of both Zavarco PLC and Zavarco Bhd and practicing lawyers. The plaintiffs alleged that they were wrongdoers in control of Zavarco PLC and Zavarco Bhd and that they have perpetrated fraud on the minority. In this suit, the plaintiffs sought various declarations including for the setting aside of a consent judgment dated 23 July 2014 which was entered by the third defendant, Zavarco PLC and Zavarco Bhd in another suit. Subsequently, the defendants filed four separate applications to strike out the plaintiffs' suit, namely (i) encl. 14 by the first, second, third, ninth, tenth, 11th, 12th and 16th defendants; (ii) encl. 19 by the fifth defendant; (iii) enlc. 22 by the fourth defendant; and (iv) encl. 25 by the third, sixth, seventh, 13th, 14th, and 15th defendants. At this interlocutory stage, the issues raised for the court's determination were: (i) whether a common law 'double derivative action' filed in Malaysia against, among others, a company incorporated in England, should be struck out on the ground that the common law derivative suits had been abolished in England pursuant to Chapter 1 of Part 11 of the United Kingdom's Companies Act 2006 ('UK Act'); (ii) whether permission from the English High Court was required for a statutory derivative action; (iii) whether a common law 'double derivative action' was valid in law; (iv) whether this suit should be struck out on the ground of impossibility of granting restitution as a relief; and (v) whether this suit which has been filed against, among others, practicing lawyers should be struck out as all communications between lawyers and clients are legally privileged and cannot be admitted as evidence under s. 126(1) of the Evidence Act 1950 ('EA').

Held (dismissing defendants' striking out applications *vide* encls. 14, 19, 22 & 25 with costs):

(1) A party adversely affected by an earlier judgment or order has a statutory right under s. 44 EA to apply to another court in a fresh suit to set aside the earlier judgment or order on the ground that the earlier judgment or order has been obtained by fraud or collusion. Based on the statement of claim, both Zavarco PLC and Zavarco Bhd have a statutory right to apply to the court to set aside the consent judgment under s. 44 of the EA. Accordingly, this suit is not a true double derivative action (cause of action is only vested in one company) as there is at least one cause of action vested in both Zavarco PLC and Zavarco Bhd. (paras 18, 19 & 29)

(2) There is nothing in principle to prohibit the filing of a 'double derivative actions' and 'multiple derivative actions' in this country. Nor is there any policy consideration which is contrary to the filing of 'double derivative actions' and 'multiple derivative actions'. If there is no

derivative action, the law would fail in its purpose and injustice would be done without redress. There may be occasions when 'double derivative actions' and 'multiple derivative actions' are necessary in the interest of justice so as to safeguard the interest of companies and their shareholders and 'double derivative actions' and 'multiple derivative actions' may prevent a wrongdoer from benefiting from his or her own wrongdoing. (para 26)

(3) The statement of claim discloses six causes of action. Accordingly, the four applications cannot succeed under O. 18 r. 19(1)(a) of the Rules of Court 2012 ('RC'). The plaintiffs have reserved their right to apply for discovery and/or interrogatories in the statement of claim. Even if the statement of claim does not disclose any reasonable cause of action, this court is not inclined to strike out this suit but may exercise its discretion to allow the plaintiffs to amend the statement of claim after the plaintiffs have filed application for discovery and/or interrogatories. (paras 32 & 33)

(4) There is no requirement in the Companies Act 1965 ('CA'), RC or any other Malaysian written law for the English High Court's permission to be given before this suit can be filed against Zavarco PLC. Significantly, our CA has no provision equivalent to UK Act. Nor is there any Malaysian case which has struck out a suit based on the UK Act. Common law derivative suit against companies incorporated in Malaysia has been expressly preserved by s. 181A(3) of the CA. There is no requirement for leave of Malaysian court under s. 181A(3) of the CA for the plaintiffs to file a derivative suit against Zavarco Bhd. If the UK Act and/or principle of *lex incorporates* is applied to strike out this suit against Zavarco Bhd, then this will be contrary to both s. 181A(3) of the CA and Malaysian case law which have allowed the institution of common law derivative suits against companies incorporated in Malaysia, such as Zavarco Bhd, without leave of Malaysian courts. (para 42)

(5) Section 57(1)(b) of the EA does not allow taking of judicial notice of opinions on English Law. If otherwise, it will be a dangerous precedent as opinions on English Law by former judges, Queen's Counsel and academicians on English Law ('Experts on English Law') have to be received by our courts without giving a right to the opposing party to cross-examine the experts on English Law. What constitutes English Law is a question of fact to be proven at a trial by way of oral evidence to be given by the experts on English Law in accordance with ss. 45(1), 46 and 51 of the EA. (para 42)

(6) Whether restitutionary remedy is available in a particular case should be decided after all the evidence has been adduced at trial. The court is only able to exercise its discretion judicially to award any appropriate relief, including restitution, after ascertaining the factual position at the conclusion of trial. At this interlocutory stage, it is neither appropriate nor just to decide whether restitution can be given or otherwise, based solely on affidavit evidence. A *fortiori* it is inappropriate and unjust to strike out a suit merely on an averment in an affidavit that restitution is impossible. (para 49)

(7) If there is any real prejudice to the defendant lawyers due to the lack of particulars in the statement of claim, their solicitors ought to have requested for further and better particulars of the statement of claim from the plaintiff's solicitors before the filing of their defence. Even if it is assumed that there has been non-compliance with O. 18 r. 12(1)(a) and (b) of the RC, such a non-compliance is a mere irregularity which is curable under O. 2 rr. 1(1) and 3 of the RC. This is because there is no prejudice to the defendant lawyers caused by any technical breach of O. 18 r. 12(1)(a) and (b) of the RC, especially when the defendant lawyers have filed their defence. (para 57)

(8) The purpose and effect of legal privilege is to facilitate the efficacious conduct of legal business between practicing advocates and solicitors ('A & S') and A & S's client. The purpose and effect of such a privilege is not to provide a defence against a civil suit to A & S and A & S's client. If A & S and their client cannot rely on legal privilege as a defence to a civil suit, a *fortiori*, they and their client cannot rely on such a privilege to strike out an action. If this suit is struck out against the defendant lawyers by reason of legal privilege, this will open the door for any party claiming marital privilege (s. 122 of the EA), affairs of state privilege (s. 123 of the EA), official communications privilege (s. 124 of the EA) and privileged information concerning commission of offence (s. 125 of the EA) to apply to strike out actions filed against these parties based on the aforesaid privileges. Such an outcome is neither just nor desirable. Admissibility issue should be decided at the trial based on oral evidence and after parties have been given a right to test the veracity of such oral evidence by way of cross-examination. The defendant lawyers cannot therefore rely on legal privilege to strike out this suit. (para 60)

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***

Abdul Rahim Suleiman & Anor v. Faridah Md Lazim & Ors [2015] 1 LNS 313 HC ***(refd)***

AIC DotCom Sdn Bhd v. MTEX Corporation Sdn Bhd & Ors [2009] 1 LNS 118 CA ***(refd)***

Airey v. Cordell [2006] EWHC 2728 HC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

A *Berjaya Land Bhd v. Wong Chee Hie & Ors [2012] 4 CLJ 356 HC* ***(refd)***
Burhan Ating & Ors v. Directors of Lands & Surveys & Ors [1992] 2 CLJ 1203; [1992] 2 CLJ (Rep) 211 HC ***(refd)***
Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 7 CLJ 808 CA ***(refd)***
Charles Koo Ho-Tung & Ors v. Koo Lin Shen & Ors (No 1) [2015] 1 LNS 755 HC ***(refd)***
Cheah Theam Kheng v. City Centre Sdn Bhd (in liquidation) & Other Appeals [2012] 2
B *CLJ 16 CA* ***(refd)***
Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***
Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 CLJ 405 FC ***(refd)***
Datuk Hj Harun Hj Idris v. PP [1976] 1 LNS 19 FC ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
East Asia Satellite Television (Holdings) Ltd v. New Cotai LLC & Ors [2011] 4 HKC 115
C *(refd)*
Erlanger v. New Sombrero Phosphate Company (1878) LR 3 App Cas 1218 ***(refd)***
Firmcity Sdn Bhd v. Agensi Pekerjaan SMC Sdn Bhd & Ors [2010] 1 LNS 969 HC ***(refd)***
Gelatissimo Ventures (S) Pte Ltd & Ors v. Singapore Flyer Pte Ltd [2010] 1 SLR 833 HC
(refd)
Halle v. Trax BW Ltd [2000] BCC 1020 HC ***(refd)***
D *Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC* ***(refd)***
HT Maltec Consultants v. Malaysian Resources Corporation Bhd & Ors [2015] 1 LNS 68 HC ***(refd)***
Knaresborough and Clare Banking Co Ltd v. Lorrimer (1896-97) 41 SJ 734 CA ***(refd)***
Kok Wee Kiat (MRS) v. Kuala Lumpur Stock Exchange Bhd & Ors [1976] 1 LNS 52
E *FC* ***(refd)***
Konamaneni & Ors v. Rolls-Royce Industrial Power (India) Ltd & Ors [2002] 1 All ER 979 ***(refd)***
KTL Sdn Bhd & Anor v. Leong Oow Lai & Other Cases [2014] 1 LNS 427 HC ***(refd)***
Lagunas Nitrate Company v. Lagunas Syndicate [1899] 2 Ch 392 ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***
F *Lakshman Prasad & Sons v. A Achuthan Nair AIR 1955 Mad 662* ***(refd)***
Lembaga Akitek Malaysia v. Cheah Kim Fah & Ors [1999] 2 CLJ 937 CA ***(refd)***
Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(refd)***
Microsoft Corp v. Vadem, Ltd, et al, CA No. 6940-VCP (Del Ch. Apr 27, 2012) (Unreported) ***(refd)***
G *Muniandy Subrayan & Ors v. Chairman & Board Members, Koperasi Menara Maju Bhd [1997] 1 CLJ 417 CA* ***(refd)***
Ng Ah Ba & Ors v. Ramanda Sdn Bhd [1996] 1 CLJ 738 CA ***(refd)***
Nigel Gray v. Allan Leddra & Anor BVIHC (COM) 79-2011 (Unreported) ***(refd)***
Novatrust Ltd v. Kea Investments Ltd & other companies [2014] EWHC 4061 ***(refd)***
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(refd)***
H *Pacific & Orient Insurance Co Bhd v. Mazlan Ahmad & Ors [2015] 1 LNS 823 HC* ***(refd)***
Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***
Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886 HC ***(refd)***
Phang Quee v. Virutthasalam & Ors [1965] 1 LNS 131 FC ***(refd)***
PP v. Hj Kassim [1971] 1 LNS 109 FC ***(refd)***
Prudential Assurance Co Ltd v. Newman Industries Ltd & Ors (No 2) [1982] 1 All ER
I *354* ***(refd)***
Ranjit Singh Gurnam Singh v. Dato Goh Cheng Hong & Ors [2015] 1 LNS 51 HC ***(refd)***
Rawther v. Abdul Kareem [1966] 1 LNS 154 FC ***(refd)***
Re Konigsberg (a bankrupt), ex parte the trustee v. Konigsberg & Ors [1989] 3 All ER 289
(refd)

Re Sarah C Getty Trust [1985] 1 QB 956 ***(refd)***
Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications [2010] 5 CLJ 32 CA ***(refd)***
Repco (Malaysia) Sdn Bhd v. Tan Toh Fatt & Ors [2012] 1 LNS 116 HC ***(refd)***
Revenue & Customs (HMRC) v. Sunico A/S & Ors [2012] EWHC 4156 (Ch) ***(refd)***
RHB Bank Bhd v. Travelsight (M) Sdn Bhd & Ors And Another Appeal [2015] 1 CLJ 309 FC ***(refd)***
S Constantine v. Social Security Organisation (SOCSO) & Anor [1998] 1 CLJ 433 CA ***(refd)***
Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners) [2000] 3 CLJ 16 CA ***(refd)***
Shahidan Shafie v. Atlan Holdings Bhd & Anor And Other Appeals [2005] 3 CLJ 793 CA ***(refd)***
Sheffield Nickel and Silver Plating Company Ltd v. Charwin (1877) 2 QBD 214 ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Skandinaviska Enskilda Banken AB, Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Lte and Other Appeals [2007] 2 SLR 367 CA ***(refd)***
Southern Acids (M) Bhd v. Standard Chartered Bank Malaysia Bhd [2012] 2 CLJ 361 HC ***(refd)***
Sternberg v. O'Neil (1988) 550 A.2d 1105 ***(refd)***
Tan Ah Tong v. Perwira Affin Bank Bhd & Ors [2001] 7 CLJ 500 HC ***(refd)***
Tan Guan Eng & Anor v. Ng Kweng Hee & Ors [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74 HC ***(refd)***
Tan Sri Musa Dato' Hj Hassan & Ors v. Uthayakumar Ponnusamy [2012] 3 CLJ 52 CA ***(refd)***
Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor [2011] 1 CLJ 491 CA ***(refd)***
The Attorney General of Hong Kong v. Lorrain Esme Osman & Ors [1993] 3 CLJ 293 HC ***(refd)***
Thorpe v. Fasey [1949] 1 Ch 649 ***(refd)***
Toralf Mueller v. ALCIM Holding Sdn Bhd & Ors [2015] AMEJ 1432 ***(refd)***
Tuan Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1996] 1 CLJ 393 CA ***(refd)***
Universal Project Management Services Ltd v. Fort Gilkicker Ltd & Ors [2013] 3 All ER 546 ***(refd)***
Waddington Ltd v. Chan Chun Hoo Thomas & Ors [2009] 2 BCLC 82 ***(refd)***
Wallersteiner v. Moir (No 2) [1975] 1 All ER 849 CA ***(refd)***
Wong Ming Bun v. Wong Ming Fan & Ors [2014] 4 HKC 316 ***(refd)***
Wong Yew Kwan v. Wong Yu Ke & Anor [2010] 2 CLJ 703 CA ***(refd)***
Yap JH v. Tan Sri Loh Boon Siew & Ors [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243 HC ***(refd)***
Yeap Nah Khe & Ors v. Tye Cho Chun & Anor [1999] 2 CLJ 726 CA ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 4(1), 181A(3)
Evidence Act 1950, ss. 23, 44, 45(1), 46, 51, 57(1)(b), 122, 123, 124, 125, 126(1)(b), 127, 128, 129
Federal Constitution, art. 5(1)
Rules of Court 2012, O. 1A, O. 2 r. 1(1), (2), (3), O. 15 rr. 4(1)(a), (b), 5(1), 6(1), O. 18 rr. 12(1)(a), (b), (3), (4), 19(1)(a), (b), (c), (d), (2), O. 34, O. 59, r. 16(2), O. 92 r. 4

A BVI Business Companies Act 2004 [UK], ss. 184C(6)(b)
Companies Act 2006 [UK], ss. 260(1), (3), 261(1)

For the plaintiffs - Mohd Izral Mohamed Khairi (Daniel Albert, Edmund Chek, Villie Neth & Gillian Looh with him); M/s Izral Partnership
For the 1st, 2nd, 8th to 12th & 16th defendants - Lim Kian Leong (Lui Kar Yee & Shim
B *Mong Seng with him); M/s Lim Kian Leong & Co*
For 3rd, 6th, 7th & 13th to 15th defendants - Wong Chong Wah (Sia Siew Mun, Wong Chun Keat & Alvin Oh Seong Yew with him); M/s Sia Siew Mun & Co
For 4th defendant - Wong Hok Mun (Koh Pei Siah with him); M/s Azim, Tunku Farik & Wong
For 5th defendant - Robert Low (Tan Chong Lii & G Sharmini with him); M/s Ranjit
C *Ooi & Robert Low*

Reported by Thirunavakarasu Vijayan

JUDGMENT

D **Wong Kian Kheong JC:**

Introduction

[1] This judgment discusses, among others, the following issues:

(a) Whether a common law "double derivative action" filed in Malaysia
E against, among others, a company incorporated in England, should be struck out on the ground that common law derivative suits have been abolished in England by Chapter 1 of Part 11 (ss. 260-264) of the United Kingdom's Companies Act 2006 [CA (UK)] and permission from the English High Court is required for a statutory derivative action. A
F determination of this issue entails a discussion on whether a common law "double derivative action" is valid in law or not. I will explain subsequently in this judgment the use of the phrase "double derivative action";

(b) In deciding whether this "double derivative action" (this suit) filed by
G the plaintiffs in this case (plaintiffs) should be struck out or otherwise, how should the court deal with two opinions by English Queen's Counsel (QC) which have been exhibited in the affidavits filed by opposing parties in this case?;

(c) Whether this suit should be struck out on the ground that it is
H "impossible" for the relief of restitution to be granted in this suit; and

(d) Whether this suit which has been filed against, among others, practising lawyers, Messrs Gunavathy Manikam (Messrs Gunavathy) and Messrs AR Yahya & Co (Messrs Yahya) (Messrs Gunavathy and Messrs Yahya
I will be collectively referred in this judgment as "defendant lawyers"), should be struck out as all communications between the defendant lawyers and their clients, are legally privileged and cannot be admitted as evidence under s. 126(1) of the Evidence Act 1950 (EA).

This Suit

[2] In this suit, the parties are as follows:

(a) The plaintiffs are Mr Ranjeet (Mr Ranjeet) and Tan Sri Syed Mohd Yusof bin Tun Syed Nasir (Tan Sri Syed Mohd Yusof);

(b) Zavarco PLC is a company incorporated in the United Kingdom on or about 29 June 2011. Zavarco PLC's former name was Vasseti (UK) PLC;

(c) The second defendant is Zavarco Bhd which was formerly known as Vasseti Bhd;

(d) The third defendant is Open Fibre Sdn Bhd (Open Fibre);

(e) The fourth and fifth defendants are Messrs Gunavathy and Messrs Yahya respectively;

(f) The sixth defendant is Encik Zulizman bin Zainal Abidin (Encik Zulizman);

(g) The seventh defendant is Puan Ku Hasniza binti Hani Ku Hashim (Puan Ku Hasniza);

(h) The eighth defendant is Puan Roslina binti Ibrahim (Puan Roslina);

(i) The ninth defendant is Mr Shailen a/l Popatlal (Mr Shailen);

(j) The tenth defendant is Tunku Mazlina binti Tunku Abdul Aziz (Tunku Mazlina);

(k) The 11th defendant is Encik Zarudin bin Ramlee (Encik Zarudin);

(l) The 12th defendant is Mr Teoh Hock Peng (Mr Teoh);

(m) The 13th defendant is Paneagle Holdings Bhd (Paneagle Holdings);

(n) The 14th defendant is Vertu Capital Ltd (Vertu), a company incorporated in the Cayman Islands;

(o) The 15th defendant is Aries Telecoms Ltd (Aries), a company incorporated in Jersey; and

(p) The 16th defendant is Mr Vinai Varayananda (Mr Vinai), a Thai national.

[3] In this suit, the statement of claim (SOC) alleges as follows:

(i) the plaintiffs are shareholders of Zavarco PLC but they are not shareholders of Zavarco Bhd;

(ii) the plaintiffs allege that the "wrongdoers" are in control of Zavarco PLC and Zavarco Bhd and these "wrongdoers" have perpetrated fraud on the minority.

V Telecoms Bhd (V Telecoms)

(iii) V Telecoms is now known as Aries Telecoms (M) Bhd;

(iv) V Telecoms is the operating entity within Zavarco PLC's group of companies. V Telecoms' principal business is in the provision of fibre optic network. V Telecoms has licences as network facilities provider as well as network services provider (telecommunication business). The Telecommunication Business was at the material time, the core business of Zavarco PLC and Zavarco Bhd;

Share swaps

(v) sometime in 2009 or 2010, Mr Ranjeet and Mr Shailen discussed ways to collaborate to enhance the business of V Telecoms. It was agreed between Mr Ranjeet and Mr Shailen that:

(a) V Telecoms would be injected into Zavarco Bhd and be part of a listing exercise; and

(b) Open Fibre was to be jointly owned by Mr Ranjeet and Mr Shailen;

(vi) as a result of the collaboration between Mr Ranjeet and Mr Shailen, Open Fibre and Zavarco Bhd executed a share purchase agreement dated 13 December 2010 (2010 Share Swap). The 2010 Share Swap provided for, among others, the following:

(a) Open Fibre would transfer 1,046,000,000 ordinary shares held by Open Fibre in V Telecoms (approximately 91% of the ordinary shares in V Telecoms) to Zavarco Bhd; and

(b) the consideration of Open Fibre's transfer of shares (held by Open Fibre in V Telecoms) was RM396,000,000 in the form of a new issue of 3,960,000 ordinary shares of RM100 each in Zavarco Bhd, to Open Fibre;

(vii) upon the completion of the 2010 Share Swap:

(a) V Telecoms became a subsidiary of Zavarco Bhd; and

(b) the following became shareholders of Zavarco Bhd:

(i) Open Fibre;

(ii) Mr Ranjeet;

(iii) Tan Sri Syed Mohd Yusof;

(iv) Dato' M Harisharan Pal Singh; and

(v) General (Retired) Dato' Sri Hj Suleiman bin Mahmud

(Shareholders);

(viii) Zavarco PLC was incorporated on 29 June 2011 with the then intention of injecting the entire Zavarco Bhd and its subsidiaries into Zavarco PLC. As agreed between Mr Ranjeet and Mr Shailen, Zavarco PLC was the vehicle which was to be listed on the Frankfurt Stock Exchange, Germany (FSX);

(ix) Zavarco PLC's directors at the material time were Puan Roslina, Tunku Mazlina, Encik Zarudin, Mr Teoh, Tan Sri Syed Mohd Yusof, Mr Gustav Carl Jan Brunner (Mr Gustav) and Mr Hirofumi Ouchi (Mr Hirofumi). Tan Sri Syed Mohd Yusof, Mr Gustav and Mr Hirofumi ceased to be Zavarco PLC's directors on or around 25 July 2014 when they were not re-elected as directors of Zavarco PLC at Zavarco PLC's annual general meeting of shareholders;

(x) as intended, simultaneously and/or concurrently with the incorporation of Zavarco PLC and the issuance of 1.2 billion ordinary share capital of Zavarco PLC (of Euro 0.10 each), the shareholders and the plaintiffs executed a sale of shares agreement on 29 June 2011 (2011 Share Swap);

(xi) the 2011 Share Swap provided for, among others, as follows:

(a) the entire issued and paid-up share capital of Zavarco Bhd held by the shareholders, would be transferred to Zavarco PLC;

(b) in return for the transfer of the shareholders' shares (in Zavarco Bhd) to Zavarco PLC, Zavarco PLC issued 1,500,000,000 ordinary shares of Euro 0.10 each to persons stated in Schedule 2 to the 2011 Share Swap (recipients). At the material time, Schedule 2 to the 2011 Share Swap was left blank; and

(c) the recipients were to be made available to Zavarco PLC by 23 July 2011 or such other dates as agreed by the parties to the 2011 Share Swap;

(xii) the plaintiffs allege that the list of recipients has been agreed between Mr Ranjeet and Mr Shailen and this agreement is as follows:

(a) both Mr Ranjeet and Mr Shailen would have equal shareholding in Zavarco PLC upon Zavarco PLC's listing on the FSX; and

(b) the equal shareholding of Zavarco PLC between Mr Ranjeet and Mr Shailen, would take into account the following:

(i) shares to be allocated to Tan Sri Syed Mohd Yusof; and

(ii) shares to be issued to various other investors including employees who had subscribed for shares in Zavarco PLC;

(xiii) the 2011 Share Swap was completed which resulted in Zavarco PLC holding the entire issued and paid-up share capital of Zavarco Bhd;

(xiv) by 3 August 2011, Zavarco PLC's share capital was increased to a total of 1,500,000,000 ordinary shares. The entire share capital of Zavarco PLC had been issued to the recipients as agreed between Mr Ranjeet and Mr Shailen;

(xv) after the issuance of Zavarco PLC's shares to the recipients, the shareholding of Zavarco PLC was split between Mr Ranjeet and Mr Shailen on an equal basis as originally agreed;

(xvi) the original intention between Mr Ranjeet and Mr Shailen to hold their equal number of shares in Zavarco PLC through Open Fibre, was subsequently and mutually varied in that Mr Ranjeet and Mr Shailen would each hold his block of shares, individually or through nominees. Mr Ranjeet's shares were held by him personally and through his nominees. Mr Shailen's shares were held by, among others, his nominees, VCB AG and Paneagle Holdings;

(xvii) Zavarco Bhd held at the material time 91% of the shares in V Telecoms;

(xviii) the directors of Zavarco PLC at the material time were Mr Shailen, Puan Roslina, Tunku Mazlina, Encik Zarudin and Mr Teoh;

(xix) Encik Zarudin, Tunku Mazlina, Mr Teoh and Puan Roslina were Zavarco Bhd's directors at the material time;

(xx) Open Fibre's only directors at the material time, were Encik Zulizman and Puan Ku Hasniza;

Mr Shailen

(xxi) the plaintiffs aver that:

(a) Mr Shailen is the "true, sole or substantial" owner and/or controller of Zavarco PLC, Zavarco Bhd, Open Fibre, Paneagle Holdings, Vertu and Aries; and

(b) the directors of Zavarco PLC, Zavarco Bhd, Open Fibre, Paneagle Holdings, Vertu and Aries are accustomed to act in accordance with Mr Shailen's directions or instructions;

Alteration of Open Fibre's shareholding

(xxii) at all material times and prior to May 2014, Open Fibre's ordinary shares were held by the following persons:

(a) Mr Ranjeet – 99,999 shares;

(b) Encik Zulizman – 133,330 shares. Tan Sri Syed Mohd Yusof has disputed this transfer of Open Fibre shares to Encik Zulizman in another court proceedings which is still pending;

(c) Puan Ku Hasniza – 100,000 shares; and

(d) Puan Roslina – 1 share;

(xxiii) prior to May 2014, Open Fibre's preference shares were held by the following persons:

(a) Primawin Ltd (Primawin), a company incorporated in British Virgin Island (BVI), holds 96,000,000 preference shares;

(b) China Finance Ltd (China Finance), a company incorporated in Samoa, holds 150,000,000 preference shares; and

(c) Arab Emirates Capital Ltd (AEC), a company incorporated in BVI, holds 150,000,000 preference shares;

(xxiv) the plaintiffs allege that Primawin, China Finance and AEC are wholly and substantially owned and/or controlled by Mr Shailen;

(xxv) on or around 18 May 2014, just a few days before the filing of the civil suit, Primawin purportedly "converted" 6,000,000 out of its 96,000,000 preference shares of Open Fibre into ordinary shares (disputed 6 million Open Fibre ordinary shares). This "conversion" has been disputed in another court proceedings which is still pending;

(xxvi) on or around 28 May 2014, in furtherance of fraud, Primawin purportedly transferred the disputed 6 million Open Fibre ordinary shares to Encik Zulizman;

(xxvii) the plaintiffs aver that the purported transfer of Open Fibre shares from Tan Sri Syed Mohd Yusof to Encik Zulizman, Primawan's purported "conversion" and purported transfer of the disputed 6 million Open Fibre ordinary shares to Encik Zulizman, was part of an overall scheme to transfer the control of Open Fibre's shareholding to Mr Shailen through Mr Shailen's nominee, namely Encik Zulizman, with the active assistance and/or participation of Open Fibre's board of directors;

Kuala Lumpur High Court Civil Suit No. 22NCC-164-05-2014 (Suit No. 164)

(xxviii) on or about 12 May 2014, Open Fibre filed Suit No. 164 against Zavarco PLC and Zavarco Bhd;

(xxix) Messrs Gunavathy represented Open Fibre while Messrs Yahya acted for both Zavarco PLC and Zavarco Bhd;

(xxx) on or around 23 July 2014, Open Fibre, Zavarco PLC and Zavarco Bhd entered into a consent judgment (consent judgment);

(xxxi) the consent judgment provided for the following orders, among others:

(a) Zavarco Bhd to transfer immediately all shares owned by Zavarco Bhd in V Telecoms to Open Fibre and Zavarco PLC was ordered to allow Zavarco Bhd to carry out the consent judgment;

(b) both Zavarco PLC and Zavarco Bhd to transfer immediately control and management of V Telecoms to Open Fibre together with all the documents of V Telecoms; and

(c) Zavarco PLC to issue new shares (based on the market price of Zavarco PLC's shares) to Open Fibre equivalent to RM150,000,000 and allot the same to Open Fibre as full settlement of a RM150,000,000 liability placed on V Telecoms due to the negligence of the officers of Zavarco PLC and Zavarco Bhd between the years 2011 to 2012 for utilising the said sum for the interest of Zavarco PLC and Zavarco Bhd;

(xxxii) the plaintiffs allege that Suit No. 164 and the consent judgment were sham proceedings in furtherance of and/or pursuant to a conspiracy to defraud Zavarco PLC and/or Zavarco Bhd designed primarily to:

(a) misappropriate the core business of Zavarco PLC and Zavarco Bhd, namely V Telecoms, to Open Fibre (and by extension, to Mr Shailen); and

(b) cause Open Fibre to gain effective control of Zavarco PLC and Zavarco Bhd;

Carrying out consent judgment

(xxxiii) on or around 27 February 2015, purportedly pursuant to the consent judgment, Zavarco PLC issued and allotted 7,052,159,653 shares (of Euro 0.10 each) to Open Fibre. This issuance and allotment effectively gave Open Fibre (and by extension, Mr Shailen) ownership and control of approximately 82.5% of the shares in Zavarco PLC;

(xxxiv) the plaintiffs have recently discovered the following:

(a) V Telecoms has been injected into Aries and Aries is now the sole shareholder of V Telecoms;

(b) the sole shareholder of Aries is Vertu;

(c) the shareholders of Vertu are Open Fibre (holding 91% of the issued and paid-up share capital of Vertu) and Paneagle Holdings (holding 9% of the issued and paid-up share capital of Vertu);

(d) Open Fibre is now substantially owned and controlled by Mr Shailen through Encik Zulizman; and

(e) the sole shareholder of Paneagle Holdings is Paneagle Sdn Bhd. Mr Shailen wholly owns and controls Paneagle Holdings through Encik Zulizman and Encik Wan Alias;

Allegations of conspiracy

(xxxv) the plaintiffs allege that Mr Shailen was part of a conspiracy with various persons stated in the SOC to:

(a) defraud Zavarco PLC, Zavarco Bhd and the court in Suit No. 164; and/or

(b) injure the plaintiffs by unlawful means, namely by misappropriating V Telecoms from Zavarco PLC and Zavarco Bhd.

(alleged conspiracy);

(xxxvi) by reason of the alleged conspiracy, the plaintiffs have suffered loss and damage;

Allegations against defendant lawyers

(xxxvii) the plaintiffs aver that the defendant lawyers have knowingly assisted and/or participated to carry and/or execute the alleged conspiracy; and

Plaintiffs' prayer for relief

(xxxviii) the SOC applies for the following relief, among others:

(a) the consent judgment be set aside;

(b) a declaration that the transfer of all ordinary shares in V Telecoms to Open Fibre or any other party through the consent judgment, is null and void;

(c) an order for Aries to transfer all the shares in V Telecoms back to Zavarco Bhd within eight days from the date of this court's order and for all incidental orders and/or directions to effect such a transfer;

(d) an order for Open Fibre to deliver up and/or cause to be delivered to the plaintiffs all documents of V Telecoms that have been transferred and/or taken through the consent judgment within eight days from the date of this court's order;

(e) an order that all shares in Zavarco PLC that were issued and/or transferred to Open Fibre through the consent judgment be cancelled within eight days from the date of this court's order and Zavarco PLC's share register be rectified and restored accordingly;

(f) as against Encik Zulizman, Puan Ku Hasniza, Puan Roslina, Mr Shailen, Tunku Mazlina, Encik Zarudin and Mr Teoh:

(i) damages for fraud, conspiracy and breach of fiduciary duty; and/or

(ii) exemplary damages; and

(g) as against the defendant lawyers, damages for knowingly assisting in the fraud, conspiracy and breach of fiduciary duty.

Four Applications To Strike Out This Suit (Four Applications)

[4] The four applications are as follows:

(a) Notice of application in Court Encl. No. 14 (Court Enclosure No. 14) has been filed by Zavarco PLC, Zavarco Bhd, Puan Roslina, Mr Shailen, Tunku Mazlina, Encik Zarudin, Mr Teoh and Mr Vinai (applicants in Court Encl. No. 14);

(b) Notice of application in Court Encl. No. 19 (Court Encl. No. 19) has been filed by Messrs Yahya;

(c) Notice of application in Court Encl. No. 22 (Court Encl. No. 22) has been filed by Messrs Gunavathy; and

(d) Notice of application in Court Encl. No. 25 (Court Encl. No. 25) has been filed by Open Fibre, Encik Zulizman, Puan Ku Hasniza, Paneagle Holdings, Vertu and Aries (applicants in Court Encl. No. 25).

Court Encl. Nos. 14 And 25

[5] Court Encl. No. 14 is premised on O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012 (RC) and the court's inherent jurisdiction.

[6] In support of Court Encl. No. 14, Mr Lim Kian Leong, learned counsel for the applicants in Court Encl. No. 14 (Mr Lim), has submitted as follows:

(a) the plaintiffs have no *locus standi* to file this common law "multiple derivative action" for two reasons. The first reason is as follows:

(i) pursuant to s. 260(1) CA (UK), a derivative action can only be brought against a company incorporated in England in accordance with Chapter 1 of Part 11 CA (UK). Briggs J (as he then was) has decided in the English High Court case of *Re Fort Gilkicker Ltd, Universal Project Management Services Ltd v. Fort Gilkicker Ltd & Ors*

[2013] 3 All ER 546 that a common law derivative action is no longer applicable under CA (UK). Reliance has been placed by the applicants in Court Encl. No. 14 on a four-page expert opinion by Mr Richard Morgan QC (Morgan QC's opinion). Morgan QC's opinion stated that "following the commencement of Chapter 1 of Part 11 [CA (UK)], a common law derivative action may no longer be brought in proceedings in England and Wales by a shareholder on behalf of an English company in which he is a member";

(ii) for the plaintiffs to bring a derivative action on behalf of Zavarco PLC, the plaintiffs must obtain "permission" from the English High Court (s. 261(1) CA (UK) provides that a member of a company must apply for "permission" (in Northern Ireland, "leave") to continue a derivative action);

(iii) the principle of "lex incorporates" regulates the right to commence a derivative action. Under the "proper plaintiff rule", a shareholder of a company has no "direct right" to file a derivative suit. Mr Lim has cited Lawrence Collins J's (as he then was) judgment in the English High Court case of *Konamaneni & Ors v Rolls-Royce Industrial Power (India) Ltd & Ors* [2002] 1 All ER 979 which has been followed by Robert Tang Kwok-Ching Ag CJHC's judgment in the Hong Kong Court of Appeal in *East Asia Satellite Television (Holdings) Ltd v. New Cotai LLC & Ors* [2011] 4 HKC 115;

(iv) the right to bring a "multiple derivative action" is governed by the law of the place of incorporation of the companies. Mr Lim relies on *East Asia Satellite Television (Holdings) Ltd* which has been adopted by Peter Ng Kar-Fai J in the Hong Kong High Court case of *Wong Ming Bun v. Wong Ming Fan & Ors* [2014] 4 HKC 316. In *Wong Ming Bun*, a derivative suit was struck out on the ground that leave from the BVI court had not been obtained for the filing of the derivative suit against a company incorporated in BVI;

(v) failure to obtain leave of the court where the company is incorporated, amounts to an abuse of court process. For this submission, Mr Lim cites Bannister J's unreported judgment in BVI's High Court case of *Nigel Gray v. Allan Leddra & Anor* BVIHC (COM) 79-2011 and the unreported decision of Parsons VC in Delaware's Court of Chancery in *Microsoft Corporation v. Vadem Ltd & Ors*, CA No. 6940-VCP (Del Ch Apr 27, 2012) (Parsons, VC). Delaware's Court of Chancery is a court of first instance and all its decisions are appealable to the Delaware's Supreme Court. Delaware's courts are widely recognised as the pre-eminent forum for resolution of disputes in corporate and business matters in the United States of America;

(vi) Zavarco PLC as the parent company of Zavarco Bhd, is an indispensable party in this multiple derivative action. Upon the plaintiffs' failure to obtain permission of the English High Court for this suit against Zavarco PLC, this entire multiple derivative suit "crumbles". For this contention Mr Lim relies on the Delaware Supreme Court's judgment delivered by Holland J in *Sternberg v. O'Neil* (1988) 550 A.2d 1105; and

(vii) when a plaintiff has no *locus standi* to bring a common law derivative action, the action should be struck off *in limine* as held by the English Court of Appeal case of *Prudential Assurance Co Ltd v. Newman Industries Ltd & Ors (No 2)* [1982] 1 All ER 354;

(b) the second reason why the plaintiffs have no *locus standi* to file this suit against Zavarco PLC is as follows:

(i) Zavarco PLC has filed Kuala Lumpur High Court Civil Suit No. 22 NCVC-131-03-2015 against, among others, the plaintiffs (Suit No. 131). On 13 July 2015, Hue Siew Kheng J has made the following order, among others:

(1) Zavarco PLC is restrained from forfeiting or cancelling 360,000,000 shares held by Tan Sri Syed Mohd Yusof in Zavarco PLC until the final outcome of Suit No. 131 (injunction against Zavarco PLC); and

(2) as a condition for the injunction against Zavarco PLC, the plaintiffs are restrained from exercising any right in respect of shares in Zavarco PLC until the final outcome of Suit No. 131 (Zavarco PLC's injunction);

(ii) the plaintiffs however obtained a stay of execution of Zavarco PLC's injunction in the Court of Appeal (Court of Appeal's decision);

(iii) Zavarco PLC has applied for leave of the Federal Court to appeal against the Court of Appeal's decision (Federal Court's leave application). Pending the disposal of the Federal Court's leave application, Zavarco PLC has applied to the Court of Appeal to stay the effect of the Court of Appeal's decision; and

(iv) if the Court of Appeal's decision is stayed or the Federal Court reverses the Court of Appeal's decision, the plaintiffs are restrained from filing this suit against Zavarco PLC. Based on *Prudential Assurance Co Ltd (No 2)*, Mr Lim submitted that the issue regarding the plaintiffs' *locus standi* as shareholders in Zavarco PLC, should be resolved before this derivative suit is allowed to proceed;

(c) the consent judgment has been executed. Consequently, the status and value of V Telecom shares has increased significantly. If this court orders restitution of V Telecom shares to Open Fibre in this case,

Zavarco PLC must reimburse the "enhanced value" of V Telecom shares and this would amount to an "unjust enrichment" of several hundred million ringgit to Open Fibre. Zavarco PLC is not in a position to reimburse such a significant sum of money to Open Fibre. According to Mr Lim, if the relief sought is one which the court cannot grant, the suit will be struck out. Mr Lim submits in the alternative that the court may strike out the plaintiffs' prayers for return of V Telecom shares and hear the merits of the plaintiffs' claim for damages. Mr Lim relies on the following cases:

(i) the Federal Court's judgment delivered by Azahar Mohamed FCJ in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441;

(ii) the judgment of a two-member coram of the Madras High Court given by PV Rajamannar CJ in *Lakshman Prasad & Sons v. A Achuthan Nair* AIR 1955 Mad 662;

(iii) the decision of Syed Agil Barakbah CJ (Malaya) (as he then was) in the Federal Court case of *Phang Quee v. Virutthasalam & Ors* [1965] 1 LNS 131; [1965] 2 MLJ 166;

(iv) Ian Chin JC's (as he then was) decision in the High Court case of *Burhan Ating & Ors v. Director of Lands & Surveys & Ors* [1992] 2 CLJ 1203; [1992] 2 CLJ (Rep) 211; and

(v) the House of Lords' judgment in *Erlanger v. New Sombrero Phosphate Company* (1878) LR 3 App Cas 1218;

(d) Mr Ranjeet has alleged the existence of an oral collateral agreement between Mr Ranjeet and Mr Shailen. Mr Shailen is neither a director nor a shareholder of Open Fibre. If this oral collateral agreement is true, this means there is an illegal arrangement between Mr Ranjeet and Mr Shailen to defraud the registered ordinary shareholders of Open Fibre as well as the three holders of Open Fibre's preference shares. This court should not assist the furtherance of an illegality as held by Abdul Malik Ishak J (as he then was) in *Tan Ah Tong v. Perwira Affin Bank Bhd & Ors* [2001] 7 CLJ 500; and

(e) Mr Ranjeet has filed a winding up petition against Open Fibre, Encik Zulizman, Puan Ku Hasniza, Puan Roslina and Mr Shailen (winding up petition). In the winding up petition, Mr Ranjeet has taken the position that the consent judgment is not beneficial to Open Fibre. Such a position taken in the winding up petition is inconsistent with the plaintiffs' stand in this suit regarding the consent judgment. Such an inconsistency, according to Mr Lim, is a "manifestation of bad faith" and this suit is clearly an abuse of court process which should not be condoned by this court. Reliance has been placed on Abdul Malik Ishak JCA's judgment in the Court of Appeal case of *Cheah Theam Kheng v. City Centre Sdn Bhd (in liquidation) & Other Appeals* [2012] 2 CLJ 16.

[7] Court Encl. No. 25 is premised on O. 18 r. 19(1)(a), (b), (d), O. 92 r. 4 RC and the court's inherent jurisdiction.

[8] Mr Wong Chong Wah (Mr Wong), learned counsel for the applicants in Court Encl. No. 25, associated himself with the aforesaid submission by Mr Lim. Mr Wong relies on the following cases which have struck out suits on the ground of lack of *locus standi* on the part of the plaintiffs:

(a) the majority of the Court of Appeal's judgment delivered by KN Segara JCA in *Tan Sri Musa Dato' Hj Hassan & Ors v. Uthayakumar Ponnusamy* [2012] 3 CLJ 52; [2012] 1 MLJ 68; and

(b) Gopal Sri Ram JCA's (as he then was) decision in the Court of Appeal case of *AIC DotCom Sdn Bhd v. MTEX Corporation Sdn Bhd & Ors* [2009] 1 LNS 118; [2011] 3 MLJ 476.

[9] Mr Wong advanced the following additional contentions to support Court Encl. No. 25:

(a) This suit is a mere afterthought as this suit has been filed after Mr Ranjeet Singh has filed the winding up petition. No action has been filed when the plaintiffs have allegedly discovered the consent judgment. Accordingly, the *bona fides* of the plaintiffs is absent and this suit should be struck out accordingly;

(b) for a rescission of an agreement to take place, parties must be capable of being restored to their original position prior to the agreement, namely *restitutio in integrum* must take place. Mr Wong cites the following cases in support of this submission:

(i) the Federal Court's judgment delivered by Jeffrey Tan FCJ in *RHB Bank Bhd v. Travelsight (M) Sdn Bhd & Ors And Another Appeal)* [2015] 1 CLJ 309; [2015] 1 AMCR 1 (Travelsight (M) Sdn Bhd);

(ii) Wynn-Parry J's decision in the English High Court case of *Thorpe v. Fasey* [1949] 1 Ch 649;

(iii) The *Sheffield Nickel and Silver Plating Company Ltd v. Charwin* (1877) 2 QBD 214;

(iv) *Erlanger*; and

(v) the English Court of Appeal's judgment in *Lagunas Nitrate Company v. Lagunas Syndicate* [1899] 2 Ch 392.

Mr Wong has contended that as Zavarco PLC has suspended its shares from trading and has been delisted from FSX, Zavarco PLC is not in a position to compensate Open Fibre for RM250 million (which has been expended by Open Fibre after the consent judgment). Zavarco Bhd is also not in a position to pay RM250 million to Open Fibre. In light of the inability of both Zavarco PLC and Zavarco Bhd to provide full restitution, this suit to set aside the consent judgment is an "exercise in futility" and ought to be struck out on the ground that this suit is frivolous or vexatious; and

(c) at best, the SOC discloses a "real dispute" between the plaintiffs and Mr Shailen. It is therefore an abuse of court process for the plaintiffs to "herd" the other defendants in this suit.

Court Encl. Nos. 19 and 22

[10] Court Enclosure No. 22 has been filed by Messrs Gunavathy under O. 18 r. 19(1)(a), (b), (c) and (d) RC. Mr Wong Hok Mun, learned counsel for Messrs Gunavathy, contended as follows in respect of Court Encl. No. 22:

(a) the plaintiffs have failed to plead with sufficient particulars against Messrs Gunavathy allegations concerning fraud and/or conspiracy to defraud. Reliance has been placed on the following cases:

(i) the judgments of Gopal Sri Ram JCA (as he then was) and Zaleha Zahari JCA (as she then was) in the Court of Appeal case of *Wong Yew Kwan v. Wong Yu Ke & Anor* [2010] 2 CLJ 703; [2009] 2 MLJ 672;

(ii) Lee Swee Seng JC's (as he then was) decision in the High Court in *Firmcity Sdn Bhd v. Agensi Pekerjaan SMC Sdn Bhd & Ors* [2010] 1 LNS 969; and

(iii) Abdul Malik Ishak JCA's judgment in the Court of Appeal case of *Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor* [2011] 1 CLJ 491; and

(b) at all material times, Messrs Gunavathy acted on the instructions of Open Fibre. The communications between Messrs Gunavathy and Open Fibre which include and are not limited to:

(i) Open Fibre's instructions to Messrs Gunavathy;

(ii) the contents or condition of any document with which Messrs Gunavathy has become acquainted with in the course of Messrs Gunavathy's retainer; and/or

(iii) advice given by Messrs Gunavathy to Open Fibre

- are legally privileged and are protected from disclosure. Since Open Fibre has not waived legal privilege, Messrs Gunavathy is not in a position to defend itself in this suit. The following cases have been cited by Messrs Gunavathy:

(1) the English Court of Appeal case of *Buttes Gas and Oil Co & Anor v Hammer & Anor (No 3)* [1981] 1 QB 223; and

(2) Su Geok Yiam J's judgment in the High Court case of *Barbara Lim Cheng Sim v Uptown Alliance (M) Sdn Bhd & Ors* [2014] 8 MLJ 314.

[11] Messrs Yahya file Court Encl. No. 19 pursuant to O. 18 r. 19(1)(a), (b), (c), (d) RC and/or the court's inherent jurisdiction. Messrs Yahya is represented by Mr Robert Low who forwards the following submission in support of Court Encl. No. 19:

(a) the plaintiffs have failed to plead sufficient particulars regarding Messrs Yahya's knowledge or state of mind as required by O. 18 r. 12(1) and/or (4) RC. Hence, this suit is frivolous as against Messrs Yahya and should be struck out according to the following cases:

(i) Shaik Daud JCA's judgment in the Court of Appeal case of *Ng Ah Ba & Ors v. Ramanda Sdn Bhd* [1996] 1 CLJ 738; [1996] 1 MLJ 62;

(ii) Asmabi Mohamad JC's (as she then was) decision in *Repco (M) Sdn Bhd v. Tan Toh Fatt & Ors* [2012] 1 LNS 116; [2013] 7 MLJ 408;

(iii) the Court of Appeal's judgment delivered by Abdull Hamid Embong JCA (as he then was) in *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808; [2011] 3 MLJ 636; and

(iv) *Wong Yew Kwan*;

(b) if this suit is not struck out, this will create a "chilling proposition that a solicitor can be simply sued or a consent judgment can be easily challenged upon a mere general allegation of fraud as regards the solicitor's conduct"; and

(c) according to s. 126 EA, Messrs Yahya cannot disclose any evidence or be compelled to give evidence relating to any communication between Messrs Yahya on the one part and their clients, Zavarco PLC and Zavarco Bhd, on the other part. If the plaintiffs are allowed to proceed with this suit, this will offend legal privilege. A mere allegation of fraud does not entitle the plaintiffs to lift the protection of legal privilege. The following cases have been cited:

(i) Nik Hashim FCJ's judgment in the Federal Court in *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405; [2009] 3 MLJ 14;

(ii) the decision of Mervyn Davies J in the English High Court case of *Re Sarah C Getty Trust* [1985] 1 QB 956;

(iii) a note of the English Court of Appeal case of *Knaresborough and Clare Banking Co Ltd v. Lorrimer* (1896-97) 41 SJ 734; and

(iv) Peter Gibson J's (as he then was) judgment in *Re Konigsberg (a bankrupt), ex parte the trustee v. Konigsberg & Ors* [1989] 3 All ER 289.

Plaintiffs' Submission In Opposition To Four Applications

[12] In opposing the four applications, learned counsel for the plaintiffs, Encik Mohd Izral bin Mohamed Khairi (Encik Izral), has contended as follows:

(a) The SOC discloses a reasonable cause of action against all the defendants such as the tort of conspiracy to defraud;

(b) This suit is a "double derivative action" for the benefit of both Zavarco PLC and Zavarco Bhd. The plaintiffs rely on the judgment of Edgar Joseph Jr J (as he then was) in the High Court case of *Tan Guan Eng & Anor v. Ng Kweng Hee & Ors* [1991] 3 CLJ 1881; [1991] 4 CLJ (Rep) 74; [1992] 1 MLJ 487;

(c) The plaintiffs have the *locus standi* to file this suit as the claims in the SOC constitute "fraud on the minority", an exception to the rule in *Foss v. Harbottle*. To strike out this suit on the ground that the plaintiffs lack *locus standi*, is to allow the defendants in this case to take advantage of their own wrong. On this point, Encik Izral cited Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case of *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577; [1999] 3 MLJ 489 (*Swee Lin Sdn Bhd*);

(d) in respect of the application of CA (UK), the plaintiffs exhibited an opinion from Mr Edward Pepperall QC (Pepperall QC's opinion) which stated, among others, as follows:

(i) CA (UK) does not expressly abolish common law derivative claims. In the absence of express and implied abolition, it is clear that common law derivative claims remain;

(ii) Chapter 1 of Part 11 of CA (UK) does not apply to Malaysia. The CA (UK) does not prevent a Common Law derivative action from being pursued in proceedings outside of England, Wales and Northern Ireland by a shareholder on behalf of an English company of which he is a member. Whether such a common law derivative action lies in Malaysia is a matter of Malaysian and not English law; and

(iii) Pepperall QC's opinion agrees with Morgan QC's opinion in respect of derivative action commenced in England and Wales;

(e) *Wong Ming Bun, East Asia Satellite Television (Holdings) Ltd, Nigel Gray* and *Microsoft Corporation* concerned companies incorporated in BVI. Section 184C of the BVI Business Companies Act 2004 [BCA (BVI)] requires leave of BVI court to be obtained before a shareholder of a company incorporated in BVI can file a derivative suit in BVI or elsewhere. Encik Izral cites the English High Court's judgment given by Pelling QC in *Novatrust Ltd v. Kea Investments Ltd & other companies* [2014] EWHC 4061;

(f) a derivative action is a mere procedural device as recognised by Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4

CLJ 551. Accordingly, derivative suits filed in Malaysia are subject to Malaysian law;

(g) the defendants in this case are estopped from raising the issue concerning the plaintiffs' *locus standi* in this case. The plaintiffs cited Gopal Sri Ram JCA's (as he then was) judgment in the Federal Court case of *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716; [1996] 1 MLJ 113;

(h) it is clear from Zavarco PLC's annual return and audited accounts that the plaintiffs' shares in Zavarco PLC have been paid up. In Suit No. 131, the Court of Appeal's decision has stayed Zavarco PLC's injunction. As such, there is no court order, be it in Malaysia or in England, which restrains the plaintiffs from exercising their rights as owner of shares in Zavarco PLC;

(i) there is no illegality in respect of Mr Ranjeet's claims in this suit;

(j) if the consent judgment is set aside in this case, restitution is possible;

(k) there is no inconsistency between the position taken by the plaintiffs in this suit with Mr Ranjeet's stand taken in the winding up petition;

(l) there is no bad faith on the part of the plaintiffs in commencing this suit;

(m) the SOC has pleaded more than sufficient particulars of the alleged conspiracy. The plaintiffs rely on the following cases:

(i) KN Segara JCA's judgment in the Court of Appeal case of *Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications* [2010] 5 CLJ 32; [2010] 5 MLJ 394;

(ii) Mohamed Dzaiddin J's (as he then was) decision in the High Court case of *Yap JH v. Tan Sri Loh Boon Siew & Ors* [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243; and

(iii) the High Court judgment of Che Mohd Ruzima JC in *Ranjit Singh Gurnam Singh v. Dato Goh Cheng Hong & Ors* [2015] 1 LNS 51; [2015] 10 MLJ 269;

(n) in respect of the reliance by the defendant lawyers on legally privileged communication, Encik Izral submitted as follows:

(i) the issue of privilege can only be determined at trial and not on affidavit evidence. In support of this proposition, the plaintiffs cite Nallini Pathmanathan J's (as she then was) decision in the High Court case of *Berjaya Land Bhd v. Wong Chee Hie & Ors* [2012] 4 CLJ 356;

(ii) there is a "fraud exception" to legal privilege as is clear from the following cases:

(1) the Singapore Court of Appeal's judgment delivered by Andrew Phang Boon Leong JA in *Skandinaviska Enskilda Banken AB, Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd and Other Appeals* [2007] 2 SLR 367 (*Skandinaviska*); and

(2) Lai Siu Chai J's decision in the Singapore High Court case of *Gelatissimo Ventures (S) Pte Ltd & Ors v. Singapore Flyer Pte Ltd* [2010] 1 SLR 833; and

(iii) the plaintiffs contend that there is a "strong *prima facie*" case to apply the "fraud exception" in this suit. Reliance has been placed on Abu Mansor Ali J's (as he then was) judgment in the High Court case of *The Attorney General of Hong Kong v. Lorrain Esme Osman & Ors* [1993] 3 CLJ 293; [1993] 2 MLJ 347; and

(o) the court should not exercise its summary jurisdiction under O.18 r. 19 RC where points of law requiring serious argument and mature consideration have been raised and where there are issues of fact which are capable of resolution only after taking *viva voce* evidence. Encik Izral relied on the Federal Court's judgment given by Gopal Sri Ram JCA (as he then was) in *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565.

Court's Approach In Deciding Striking Out Applications

[13] In *HT Maltec Consultants v. Malaysian Resources Corporation Berhad & Ors*; [2015] 1 LNS 68; [2015] 5 AMR 607, at 618-619, I took the following approach in deciding an application to strike out an action based on my understanding of Malaysian case law:

10. In deciding These Applications, I adopt the following approach:

(a) a pleading can only be struck out in a plain and obvious case, namely where that pleading is obviously unsustainable – the Supreme Court's judgment in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, at 43;

(b) the mere fact that a pleaded case is weak and is not likely to succeed, is not a ground to strike out that pleading – *Bandar Builder Sdn Bhd*, at p. 44;

(c) the court will assume that the contents of the pleading in question are true – the Court of Appeal's decision in *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd & other appeals* [1996] 1 MLJ 661, at 679;

(d) every Malaysian citizen has a constitutional right of access to justice under article 5(1) of our Federal Constitution – the Federal Court's judgment in *Sivarasa Rasiah v. Badan Peguam Malaysia* [2010] 3 CLJ 507, at 514-515. Unless a suit is obviously unsustainable, I will be reluctant to deprive a Malaysian citizen of his or her fundamental right of access to justice;

(e) under Order 18 rule 19(1) RC, in the interest of justice the court has a discretion to direct the statement of claim be amended – Court of Appeal's judgment in *Muniandy s/o Subrayan & Ors v. Chairman & Board Members of Koperasi Menara Maju Bhd* [1991] 1 MLJ 557, at 560 and 561;

(f) in deciding an application under Order 18 rule 19(1) RC, the court has power to stay an action. I will discuss about this power later in this judgment;

(g) in considering a striking out application under Order 18 rule 19(1)(a) RC, the court cannot consider affidavit evidence according to Order 18 rule 19(2) RC – the Court of Appeal's judgment in *See Thong v. Saw Beng Chong* [2013] 3 MLJ 235, at 241. Based on *See Thong*, I will first decide These Applications under Order 18 rule 19(1)(a) RC on whether the ASOC disclosed any reasonable cause of action against the 1st to 6th Defendants (1st Inquiry). For the 1st Inquiry, I will only consider the Amended OS and I will not take into account any affidavit evidence in compliance with Order 18 rule 19(2) RC;

(h) after the 1st Inquiry, I will consider all the affidavit evidence filed by all the parties in These Applications in a subsequent inquiry (2nd Inquiry) to decide whether This Suit:

(i) is scandalous, frivolous and/or vexatious under Order 18 rule 19(1)(b) RC; and/or

(ii) is an abuse of court process under Order 18 rule 19(1)(d) RC, Order 92 rule 4 RC and/or the court's inherent jurisdiction; and

(i) after the 1st and 2nd Inquiries, if the court decides not to strike out a suit, the court should:

(1) not express any view in respect of the strength or weakness of the suit; and

(2) refrain from making any finding of fact as the court cannot embark on a trial on affidavits, especially when there are conflicting affidavits.

This is to preserve the integrity of the suit in question. Any dispute of facts should and can only be resolved at the trial based on oral evidence and after each party has exercised his or her right to cross-examine the opposing party's witnesses. I rely by analogy on the Supreme Court's judgment in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241, at 266, regarding the court's duties in deciding an interlocutory injunction application.

[14] The decision in *HT Maltec Consultants* has been affirmed by the Court of Appeal but I am not aware of any written judgment by the Court of Appeal in that case.

[15] Based on trite law in respect of striking out applications as elaborated in *HT Maltec Consultants*, I will adopt the following approach in deciding the four applications:

(a) as the four applications are based on, among others, O. 18 r. 19(1)(a) RC, the first inquiry is to peruse the SOC without considering any affidavit (according to O. 18 r. 19(2) RC) to decide whether the SOC discloses any reasonable cause of action against the defendants in this case (first inquiry). In the first inquiry, I will assume that the contents of the SOC are true;

(b) if the SOC discloses a reasonable cause of action against the defendants in this case, this court will then consider all the affidavit evidence filed by all the parties in these four applications to decide whether this suit should be struck out under O. 18 r. 19(1)(b), (c), (d), O. 92 r. 4 RC and/or the court's inherent jurisdiction (second inquiry). It is to be noted that the defendant lawyers have relied on O. 18 r. 19(1)(c) RC; and

(c) if the court decides not to strike out this suit after the first and second inquiries, the integrity of the trial of this suit should be maintained as follows:

(i) the court should not express any view in respect of the merits of the position of the parties in this suit;

(ii) the court should refrain from making any finding of fact as the court cannot embark on a trial on affidavits, especially when there are conflicting affidavits; and

(iii) whatever stated in this judgment does not estop the parties in respect of any of the issues, factual and legal, to be decided at the trial of this suit. In other words, there is nothing in this judgment which can attract the application of the issue estoppel doctrine so as to bar subsequently the parties during the trial of this suit. All the parties in this suit are at liberty to:

(1) adduce any evidence at the trial of this suit; and

(2) present any submission to the court

- as the parties see fit.

[16] In view of the settled legal position concerning striking out applications, a host of cases cited by learned counsel for all parties in this case which do not concern applications to strike out suits, should be read with caution.

Section 44 EA

[17] Before I embark on the first and second inquiries in this case, I should refer to s. 44 EA which provides as follows:

> *Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party*, was delivered by a court not competent to deliver it or **was obtained by fraud or collusion**.
>
> (emphasis added)

[18] A judgment or order of a court may be invalidated under s. 44 EA on, among others, the ground that the judgment or order has been obtained by fraud or collusion. I am of the view that a party adversely affected by an earlier judgment or order has a statutory right under s. 44 EA to apply to another court in a fresh suit to set aside the earlier judgment or order on the ground that the earlier judgment or order has been obtained by fraud or collusion. This view is based on the following cases:

(a) in *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143, at 144, Chang Min Tat FJ delivered the following judgment of the Federal Court:

> Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in Order 28 rule 11 Rules of the Supreme Court 1957 (Order 20 rule 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: *Re St Nazaire Co* 12 Ch D 88, *Kelsey v Doune* [1912] 2 KB 482; *Hession v Jones* [1914] 2 KB 421, unless it is a judgment by default or made in the absence of a party at the trial or hearing. *But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: Hip Foong Hong v Neotia & Co* [1918] AC 888 and *Jonesco v Beard* [1930] AC 298.
>
> (emphasis added);

(b) Siti Norma Yaacob JCA (as she then was) decided as follows in the Court of Appeal case of *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners)* [2000] 3 CLJ 16, at p. 24:

> *Despite the above restrictions, an aggrieved party can still impeach a regularly drawn up order but only in a fresh suit brought to attack the order on the grounds that such an order had been obtained by fraud or that fresh evidence, not available at the trial or hearing, had since surfaced that may affect the order.*
>
> (emphasis added);

(c) Gopal Sri Ram JCA's (as His Lordship then was) judgment in the Court of Appeal case of *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321, at 334-336, as follows:

> I think I may begin this part of the case by referring to s. 44 [EA].
> ...
>
> *The principle then to be culled from the authorities is that a judgment may be impeached for deliberate fraud practised upon the court, and it is insufficient to show that a litigant merely convinced the court through misleading or erroneous evidence. Whether the test has been met in any given case must, I think, depend on the facts and circumstances of the particular case.*
>
> (emphasis added);

(d) in *KTL Sdn Bhd & Anor v. Leong Oow Lai & Other Cases* [2014] 1 LNS 427; [2014] AMEJ 1458, at paras. 143, 144 and 147 to 149, I have set aside a consent judgment based on fraud and/or collusion. There is no appeal to the Court of Appeal against this decision; and

(e) in *Pacific & Orient Insurance Co Bhd v. Mazlan Ahmad & Ors* [2015] 1 LNS 823; [2015] AMEJ 1489, at para. 43, I have decided as follows:

> 43. I am of the view that according to the cases discussed in *Adon*, in particular *Badiaddin* and *Selvam Holdings (Malaysia) Sdn Bhd*, the High Court has inherent jurisdiction to set aside an earlier sealed order or judgment of a High Court in rare and exceptional circumstances *(Vitiating Circumstances). I am of the further view that the High Court's jurisdiction to set aside an earlier perfected order or judgment based on lack of jurisdiction and/or fraud, is statutory and is based on s 44 of the Evidence Act 1950 (EA).*
>
> (emphasis added)

An appeal to the Court of Appeal against my decision in *Pacific & Orient Insurance Co Bhd* is still pending.

[19] From the above cases, it is clear that s. 44 EA provides a statutory right to any party aggrieved by a court's judgment or order to file a fresh suit to set aside the judgment or order.

Validity Of "Derivative Action", "Double Derivative Action" And "Multiple Derivative Action"

[20] Derivative suits are creatures of case law as explained by Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Abdul Rahim Aki*, at pp. 558 and 559-560, as follows:

> **We begin with the rule in *Foss v. Harbottle* (1843) 67 ER 189. The rule has two limbs**. The first limb of the rule - and the present appeal has nothing to do with its application - is that a court will not interfere with the internal workings of a corporation upon a matter which is capable of being ratified by a majority of shareholders present and voting at a general meeting of the company. ...
>
> *The second limb of the rule is of much wider purport and is universal in its application. It is based upon the doctrine that only he who has been injured may sue. Translated into company law, the proposition may be stated thus. If a wrong has been done to a company, then it is the company which is the proper plaintiff in an action brought to redress the injury. An individual shareholder or even a group of shareholders forming a minority on the floor of a general meeting of the company have no locus standi to bring an action to remedy a wrong done to a company. ...*
>
> *We now turn to consider one exception with which this case is concerned. It is the derivative action; an ingenious procedural device created by Court of equity by which, the role of judicial non-interference is overcome. It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision making organs and will not, for that reason, permit an action to be brought in its name. In these circumstances, a minority*

shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers must be cited as defendants. So too must the company. The title to the action must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so. Further, there must be an express statement in the pleading that the action is brought for the benefit of the company named as a defendant. An action does not meet these requirements is liable to be struck out as being frivolous and vexatious.

(emphasis added).

[21] As "derivative suits" are creatures of case law, there is no definition of a "derivative suit", let alone definitions of "double derivative action" or "multiple derivative action". For the purpose of this judgment, I will use the phrase "double derivative action" to refer to cases where two companies are involved in the following manner:

(a) a cause of action is vested in a particular company (company A);

(b) the plaintiff in question is not a shareholder of company A but is a shareholder of the holding company (company B) of company A; and

(c) the wrongdoers control both companies A and B.

[22] In contradistinction to a "double derivative action" as I have understood it, I use the phrase "multiple derivative action" to refer to a "derivative suit" which concerns three companies or more. An example of a "multiple derivative action" is a case wherein:

(a) a cause of action is vested in company A which is a subsidiary of company B. Company C is the parent company of company B and is the "ultimate holding company" of company A;

(b) the plaintiff is only a shareholder in company C; and

(c) the wrongdoers control companies A, B and C.

In *Re Fort Gilkicker Ltd*, at p. 548, Briggs J explained that a "double derivative action" is a sub-species of a "multiple derivative action". Briggs J further held in *Re Fort Gilkicker Ltd*, at p. 552, that it is not necessary to distinguish between "ordinary" and "multiple derivative actions":

[24] It is not I think particularly surprising that the court has, where necessary, been prepared to permit derivative claims to be brought on behalf of companies in wrongdoer control by persons other than their immediate shareholders without regarding those cases as special, and in particular without thinking it necessary to distinguish between 'ordinary' and 'multiple' derivative actions. Once it is recognised that the derivative action is merely a procedural device designed to prevent a wrong going without a remedy (see Nurcombe v Nurcombe [1985] 1 All ER 65 at 69, [1985] 1 WLR 370 at 376) then it is unsurprising to find the court extending locus standi to members of the wronged company's holding company, where the holding company is itself in the same wrongdoer control. The would-be claimant is not

exercising some right inherent in its membership, but availing itself of the court's readiness to permit someone with a sufficient interest to sue as the company's representative claimant, for the benefit of all its stakeholders.

(emphasis added).

[23] "Double derivative actions" have been filed in the following English cases but there is no discussion on the validity of such suits in those cases:

(a) the English Court of Appeal case of *Wallersteiner v. Moir (No 2)* [1975] 1 All ER 849;

(b) Richard Scott VC's (as he then was) decision in the English High Court case of *Halle v. Trax BW Ltd* [2000] BCC 1020; and

(c) Warren J's judgment in the English High Court case of *Airey v. Cordell* [2006] EWHC 2728

[24] The Hong Kong Court of final appeal (the highest court in Hong Kong) has recognised the validity of a "multiple derivative action" in *Waddington Ltd v. Chan Chun Hoo Thomas & Ors* [2009] 2 BCLC 82 in the following judgments:

(a) the joint judgment of Bokhary and Chan JJ, at pp. 85-86:

[2] *We agree with the judgment of Lord Millett and the observations added by Ribeiro J. All that we would add is simply this. On the well-established thinking as to why a single derivative action is maintainable, there is no reason why a multiple derivative action is not*. That is the shortest answer to all of the objections raised to the court holding that multiple derivative actions are maintainable in Hong Kong. These objections include the one that so holding would be an act of creation best left to the legislature. There are considerations that sometimes operate, singly or in combination, to persuade the judiciary to leave a development of the law to the legislature. Principal among these considerations are that the proposed development: (i) would, unless prospective only, upset existing dealings; (ii) calls for wide-ranging consultations available only under the legislative process; and (iii) involves laying down a rule that requires conditions and exceptions which the legislature is best placed to prescribe. None of these considerations, or any other consideration militating against development of the law by judicial decision, operates in the present case. Further legislation in this branch of the law may be highly desirable. *But, despite all the arguments so ably advanced by Mr Victor Joffe QC for the appellant, the court can and should hold here and now that multiple derivative actions are maintainable in Hong Kong.*

(emphasis added); and

(b) the judgment of Lord Millet NPJ (non-permanent judge), at pp. 94-95, 100 and 101-105 [concurred by Li CJ (at p. 85) an Ribeiro J (at p. 86)]:

[33] *Two questions arise for decision in this appeal. The first is whether a minority shareholder's or derivative action may be brought by a person who is not a shareholder in the company in which the cause of action is vested and on behalf of*

which the action is brought but a shareholder in its parent or ultimate holding company. Such an action has been described in the United States and in argument before us as a double or multiple derivative action (depending on whether the cause of action is vested in a subsidiary or sub-subsidiary), and for convenience I shall so describe it even though the description may be somewhat misleading. In the interest of brevity I shall also use the expression 'multiple derivative action' to embrace both double and multiple derivative actions. …

Multiple derivative actions

[61] *So far as the researches of counsel have been able to discover, there has never been a reasoned decision of a higher court in any common law jurisdiction outside the United States which is determinative of this question. We must decide it as a matter of principle.*

…

[64] The only case in which the question whether a multiple derivative action may be maintained has been decided in a common law jurisdiction outside the United States is *Ruralcorp Consulting Pty Ltd v. Pynery Pty Ltd* (1996) 21 ACSR 161, a decision of the senior master of the State of Victoria. He ruled that it may not. I shall have to return to this decision later.

…

[67] But it is not necessary to travel to the United States to appreciate the need for a multiple derivative action to be maintainable. *Lord Denning's justification of the derivative action in Wallersteiner v Moir (No 2) applies as well to the case where the wrongdoers, who through their control of the parent company also control its subsidiaries, defraud a subsidiary or sub-subsidiary as it is to the case where they defraud the parent company itself. In either case wrongdoer control precludes action by the company in which the cause of action is vested; and yet:*

> *In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress.*

[68] In my opinion it is not for the plaintiff to demonstrate that a multiple derivative action is maintainable in Hong Kong but for the appellant to show why it is not.

[69] This the appellant has set out to do. His reasons for disallowing the action may be summarised as follows:

(1) The action contravenes fundamental principles of company law and in particular the principles (i) that a company is a separate legal person from its shareholders and (ii) that save in exceptional circumstances which are not alleged in the present case directors owe fiduciary duties to the company alone and not to its shareholders, let alone to the shareholders of its parent company.

(2) A multiple derivative action is in truth two derivative actions, one by the shareholders on behalf of the parent company against the subsidiary for its failure to sue the wrongdoers and the other by the parent company on behalf of the subsidiary against the wrongdoers. But neither action is maintainable, first because the subsidiary owes

no duty to its parent company to bring proceedings against the wrongdoers, and secondly because the parent company is in control of the subsidiary and does not need the intervention of its shareholders to enable it to bring such proceedings.

(3) It is well established that only a shareholder can bring a derivative action on behalf of the company of which he is a member. A shareholder in a parent company has no title or interest in and is a stranger to the shares of its subsidiaries. He has no rights in relation to the conduct of the affairs of the subsidiaries or in relation to the manner in which the directors of a subsidiary manage or dispose of its assets.

(4) It is untrue to say that, absent the multiple derivative action, a wrong would be without redress. It is true that in the 19th century when the derivative action was first developed there was no alternative remedy. But for many years now minority shareholders have had a statutory means of obtaining redress if the affairs of the company are being conducted in a manner prejudicial to their interests. The current provision in England is s 459 of the Companies Act 1985, replacing earlier provisions contained in the Companies Acts of 1948 and 1980. Legislation in Hong Kong has broadly reflected the position in England: for the current provision see s 168A of the Companies Ordinance.

(5) Legislation expressly authorising multiple derivative actions has been introduced in recent years in Australia, New Zealand, Canada and Singapore. Its introduction in Hong Kong should be left to the legislature. It should not be created by the courts, which lack the ability to resolve the many questions which would arise.

[70] *The first objection is seriously weakened by the fact that other Commonwealth countries have all legislated to introduce multiple derivative actions without finding it necessary to make any significant changes to company law to accommodate them. Both the first and second objections depend on the same analysis of the multiple derivative action as two or more derivative actions which have been consolidated into one, as its name implies. But as I indicated at the outset the description, though convenient, is deceptive. The action is a single action on behalf of the company in which the cause of action is vested. The only question is whether the action, which may be brought by a member of the company, may be brought by a member of its parent or ultimate holding company. This is simply a question of locus standi.*

[71] This is the question raised by the third objection, and it lies at the heart of the case. There are numerous *dicta* in the cases to the effect that only a shareholder may bring a derivative action to enforce a right vested in the company. But most of them are merely obiter. Where they have formed the ground for decision, they have to be understood in their context. In every case where the status of the plaintiff has been determinative, the question was whether a former shareholder or a person who was an equitable but not the legal owner of the shares in question could maintain the action: for former shareholders, see *Birch v Sullivan* [1958] 1 All ER 56, at 58, [1957] 1 WLR 1247 at 1249 (England), *Dynevor*

Pty Ltd v Proprietors, Centrepoint Building Units Plan No 4327 [1995] QCA 166 (Queensland), *Keaney v Sullivan* [2007] IEHC 8 at 19 and *O'Neill v Ryan* [1993] ILRM 557 (Ireland); and for equitable owners, see *Maas v McIntosh* (1928) 28 SR (NSW) 441 and *Hooker Investments Ltd v Email Ltd* (1986) 110 ACLR 443 at 435 (New South Wales). The focus in all these cases was on the character of the plaintiff's shareholding; he must be a current and legal shareholder. **The present case is concerned with a different question: the identity of the company of which he must be such a shareholder.**

[72] *The only case in which the question whether a shareholder may maintain a multiple derivative action to enforce the rights of a subsidiary of the company of which he is a member has fallen for decision is the Ruralcorp case (1996) 21 ACSR 161. The senior master gave two grounds for his conclusion that he may not. The first was that the plaintiff was 'a stranger' to the company, and 'strangers' are not entitled to bring a derivative action. By 'stranger', however, the senior master meant no more than a person who was not a shareholder, so his statement was not a reason for his conclusion but merely an assertion of it.*

[73] *His second ground, scarcely more convincing than the first, was that equitable owners of shares in a company had no standing to bring a derivative action, and the want of standing of persons who had no legal or equitable interest in the shares was a fortiori. But the reason why persons with only an equitable interest in a company's shares cannot bring a derivative action on its behalf is that a company does not recognise or give effect to equitable interests. Such persons are not named in the company's register of members, and their existence let alone their identity is not discoverable from the share register. But the identity of the shareholders of a company's parent company is readily ascertainable by an inspection of the relevant share registers.*

[74] *As I have said, the question is simply a question of the plaintiff's standing to sue. This would have been obvious when the procedure was for the proposed plaintiff to apply to the court for leave to use the company's name. On a question of standing, the court must ask itself whether the plaintiff has a legitimate interest in the relief claimed sufficient to justify him in bringing proceedings to obtain it. The answer in the case of person wishing to bring a multiple derivative action is plainly 'Yes'. Any depletion of a subsidiary's assets causes indirect loss to its parent company and its shareholders. In either case the loss is merely reflective loss mirroring the loss directly sustained by the subsidiary and as such it is not recoverable by the parent company or its shareholders for the reasons stated in Johnson v. Gore Wood & Co [2001] 1 BCLC 313, [2002] 2 AC 1. But this is a matter of legal policy. It is not because the law does not recognise the loss as a real loss; it is because if creditors are not to be prejudiced the loss must be recouped by the subsidiary and not recovered by its shareholders. It is impossible to understand how a person who has sustained a real, albeit reflective, loss which is legally recoverable only by a subsidiary can be said to have no legitimate or sufficient interest to bring proceedings on behalf of the subsidiary.*

[75] This is not to allow economic interests to prevail over legal rights. The reflective loss which a shareholder suffers if the assets of his company are depleted is recognised by the law even if it is not directly recoverable by him. In the same way the reflective loss which a shareholder suffers if the assets of his company's subsidiary are depleted is recognised loss

even if it is not directly recoverable by him. *The very same reasons which justify the single derivative action also justify the multiple derivative action. To put the same point another way, if wrongdoers must not be allowed to defraud a parent company with impunity, they must not be allowed to defraud its subsidiary with impunity.*

[76] The appellant submitted that the plaintiffs in a single derivative action are allowed to bring the proceedings not because they have suffered a reflective loss but because the right to bring such proceedings is an incident of their shareholding. There are two answers to this. In the first place it begs the question, for if shareholders are allowed to bring a multiple derivative action then the right to bring it will be another incident of their shareholding. In the second place, it is necessary to ask why the shareholder's right to bring a derivative action is an incident of his shareholding, and the reason is that he is regarded as having a legitimate and sufficient interest in the relief claimed in the proceedings.

...

[79] The last objection must also be rejected. Australia, New Zealand, Canada and Singapore have all introduced legislation to require the plaintiff to obtain the leave of the court before instituting or continuing derivative actions, and have taken the opportunity to permit multiple derivative actions where the cause of action is vested in a 'related' or 'affiliated' company of the company of which the plaintiff is a member. The various statutes have different threshold tests, different approaches to deciding whether the proposed action is in the interests of the company, and different procedures. But it is noticeable that in prescribing such requirements none of the statutes draws any distinction between the single derivative action and the multiple derivative action; and in truth there is no conceivable reason why the procedural and other requirements of the two kinds of action should differ.

[80] *We have no power to extend the provisions of s 168BC to multiple derivative actions by analogy. We must leave such actions to continue to be governed by the common law, while expressing the hope that the legislature may in due course extend the section to cover them, and perhaps at the same time take the opportunity to consider whether it is really sensible to maintain two parallel regimes with different threshold tests, one requiring leave and the other not.*

(emphasis added).

[25] Lord Millet NPJ's judgment in *Waddington Ltd* has been followed in *Re Fort Gilkicker Ltd*, at pp. 552-553, as follows:

[25] *The question whether the common law permitted that extended form of derivative claim (whether called double or multiple being merely a matter of classification) was fully reviewed as a matter of the law of Hong Kong by the Hong Kong Court of Final Appeal in Waddington Ltd v Chan Chun Hoo Thomas and others [2008] HKCU 1381, [2009] 2 BCLC 82. Lord Millett NPJ's judgment contains (at [61]-[80]) a comprehensive review of the issue which, taking into account the four English*

examples to which I have referred, answers the question decisively in the affirmative for reasons which appear to me as applicable to English as to Hong Kong common law, at least as it stood prior to the coming into force of the 2006 Act. The Waddington case was followed in relation to the common law of the Cayman Islands in Renova Resources Private Equity Ltd v Gilbertson [2009] CILR 268.

[26] *In my judgment the common law procedural device called the derivative action was, at least until 2006, clearly sufficiently flexible to accommodate as the legal champion or representative of a company in wrongdoer control a would-be claimant who was either (and usually) a member of that company or (exceptionally) a member of its parent company where that parent company was in the same wrongdoer control. I would not describe that flexibility in terms of separate forms of derivative action, whether headed 'ordinary', 'multiple' or 'double'. Rather it was a single piece of procedural ingenuity designed to serve the interests of justice in appropriate cases calling for the identification of an exception to the rule in Foss v Harbottle.*

(emphasis added).

[26] I am not aware of any Malaysian case which has decided on the validity of a "double derivative action" or "multiple derivative action". I have quoted extensively Lord Millet NPJ's judgment in *Waddington Ltd* because I am persuaded that the reasoning given in that case for upholding the validity of "multiple derivative actions", should also apply in Malaysia. I also accept the reason given in *Re Fort Gilkicker Ltd*, namely, irrespective of whether it is a "double derivative action" or "multiple derivative action", the action is "a single piece of procedural ingenuity designed to serve the interests of justice in appropriate cases calling for the identification of an exception to the rule in *Foss v. Harbottle*". In my view, there is nothing in principle to prohibit the filing of a "double derivative action" and "multiple derivative action" in this country. Nor is there any policy consideration which is contrary to the filing of "double derivative actions" and "multiple derivative actions". To the contrary, the following reasons support the filing of a "double derivative action" or "multiple derivative action" in this country:

(a) as held by Lord Denning MR in *Wallersteiner (No 2)*, at p. 857, if there is no "derivative actions", the law would fail in its purpose and injustice would be done without redress. There may be occasions when "double derivative actions" and "multiple derivative actions" are necessary in the interest of justice so as to safeguard the interest of the companies and their shareholders in question; and

(b) "double derivative actions" and "multiple derivative actions" may prevent a wrongdoer from benefiting from his or her own wrongdoing.

[27] *Re Fort Gilkicker Ltd* is significant because in that case, at p. 548, all the shares of the company in question were owned by a limited liability partnership (LLP) and not by a holding company. The applicant for

permission of the English High Court to continue a "statutory derivative action" under CA (UK) on behalf of the company, was a member of the LLP. Despite the fact that the applicant was not a shareholder of a parent company but only a member of the LLP which owns all the shares in the company, Briggs J held as follows, at pp. 557-558:

> **What if the holding company is an LLP?**
>
> [50] *A main plank in Miss Smith's oral submissions against the grant of permission was that, whatever may have been the ambit of the common law derivative action, it did not extend so far as to permit members of an LLP to bring proceedings on behalf of a company wholly owned by that LLP.* She bolstered that submission by reference to the fact that, although the unfair prejudice remedy has been afforded to members of LLPs, they have been given no statutory means of bringing a derivative claim where the LLP is in wrongdoer control.
>
> [51] *I do not find these objections persuasive. First, once it is recognised that the extension of locus standi beyond the immediate members of the wronged company is based upon the need to find a suitably interested claimant to pursue the company's claim when it is disabled from doing so, the precise nature of the corporate body which owns the wronged company's shares is of no legal relevance, provided that it is itself in wrongdoer control and has some members at least who are interested in seeing the wrong done to the company put right. As I have said earlier, the locus standi given to the member of the intermediate entity is not an aspect of that person's rights as a member, but simply the consequence of the law's search for a suitably interested representative, or champion, of the wronged company.*
>
> [52] **Secondly, I consider it irrelevant that the LLP's members have no recourse to a statutory derivative claim.** That lacuna (if such it be) relates to the remedies for wrongs done to the LLP, rather than to the company which it owns. Provided that, as I have concluded, the common law multiple derivative action has been preserved as a means of dealing with wrongs done to the company, the existence of a lacuna at the intermediate level is no significant objection to its use, either as a matter of entitlement or discretion, at the permission stage.
>
> (emphasis added)

[28] *Re Fort Gilkicker Ltd* has allowed a person who is neither a member of the company (in which a cause of action is vested) nor a member of the parent company, to file a "double derivative suit" or "multiple derivative suit" provided that the plaintiff has "sufficient interest to sue as the company's representative claimant, for the benefit of all its stakeholders" or is "a suitably interested representative, or champion, of the wronged company". I am in favour of such a development in the *locus standi* for the filing of "double derivative suits" or "multiple derivative suits" for the same reasons as explained in the above para. 26.

[29] In this case, it should be noted that based on the SOC, both Zavarco PLC and Zavarco Bhd have a statutory right to apply to court to set aside the consent judgment under s. 44 EA. Accordingly, this suit is not a true

A "double derivative action" (cause of action is only vested in one company) as there is at least one cause of action vested in both Zavarco PLC and Zavarco Bhd.

First Inquiry - Does SOC Disclose Reasonable Cause Of Action?

B **[30]** A reading of the SOC shows the following six causes of action (six causes of action):

(a) paragraphs 12, 13, 79 to 82 and 95 SOC allege that the consent judgment has been obtained by fraud or collusion. The plaintiffs claim in the SOC that Zavarco PLC and Zavarco Bhd are parties in Suit No. 164 and have
C been adversely affected by the consent judgment. As such, Zavarco PLC and Zavarco Bhd have a statutory right under s. 44 EA to file this suit to set aside the consent judgment. As the plaintiffs are only shareholders in Zavarco PLC and since Zavarco PLC is the parent company of Zavarco Bhd, the plaintiffs can file this "double derivative action" for
D the benefit of both Zavarco PLC and Zavarco Bhd;

(b) in para. 14 SOC, the plaintiffs have averred that the wrongdoers in this case who control Zavarco PLC and Zavarco Bhd have perpetrated "fraud on the minority". It is trite law that "fraud on the minority" constitutes a basis for a derivative action – *Abdul Rahim Aki*, at pp. 559
E and 563;

(c) the plaintiffs have claimed in paras. 51, 59, 60 and 93.4 to 93.7 SOC that various defendants named therein have breached their fiduciary duties owed to Zavarco PLC and Zavarco Bhd (breach of fiduciary duties). Case law has recognised breach of fiduciary duties as a ground
F to commence a derivative suit;

(d) it is alleged in paras. 40 to 42, 44, 47 and 50 SOC that there have been oral agreements between Mr Ranjeet and Mr Shailen regarding, among others, Open Fibre, Zavarco PLC and Zavarco Bhd. Mr Ranjeet has therefore claimed a personal cause of action against Mr Shailen for
G breach of oral contracts;

(e) paragraphs 12, 13, 92, 93, 95, 96 and 99 SOC allege a tort of conspiracy to defraud:

(i) the court in Suit No. 164 (which has recorded the consent
H judgment);

(ii) Zavarco PLC; and

(iii) Zavarco Bhd; and

(f) the plaintiffs aver in paras. 92, 93, 95, 97 and 98 SOC that there was
I a:

(i) tort of conspiracy by unlawful means to injure the plaintiffs; and

(ii) tort of conspiracy to defraud the plaintiffs.

[31] In deciding the four applications, this court must assume that the SOC is true. This is clear from Mahadev Shankar JCA's judgment in the Court of Appeal case of *Tuan Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1996] 1 CLJ 393; [1996] 1 MLJ 661, at 679. Furthermore, as held by Mohd Dzaiddin SCJ (as he then was) in the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36, at 44, the mere fact that a pleaded case is weak and is not likely to succeed, is not a ground to strike out the case.

[32] Premised on the above reasons, the first inquiry must be answered in the plaintiffs' favour – the SOC discloses six causes of action. Accordingly, the four applications cannot succeed under O. 18 r. 19(1)(a) RC.

[33] It is to be noted that the plaintiffs have reserved their right to apply for discovery and/or interrogatories in paras. 79, 93.11 and 94 SOC. The following two Court of Appeal cases have held that O. 18 r. 19(1) RC confers a discretion on the court to allow a plaintiff to amend the SOC (instead of striking out the suit):

(a) Mahadev Shankar JCA's decision in the Court of Appeal in *Muniandy Subrayan & Ors v. Chairman & Board Members, Koperasi Menara Maju Bhd* [1997] 1 CLJ 417, [1997] 1 MLJ 557, at pp. 560 and 561; and

(b) the judgment of Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Shahidan Shafie v. Atlan Holdings Bhd & Anor And Other Appeals* [2005] 3 CLJ 793, at p. 803.

Even if the SOC in this case does not disclose any reasonable cause of action, this court is not inclined to strike out this suit but may exercise its discretion to allow the plaintiffs to amend the SOC after the plaintiffs have filed application for discovery and/or interrogatories.

[34] I have not overlooked the fact that the plaintiffs have "combined" a "double derivative action" with personal causes of action in this suit against all the defendants in this case. I am not able to find any Malaysian case on this point. I am of the opinion that RC does not prohibit such a course adopted by the plaintiffs in this case. I refer to O. 15 rr. 4(1), 5(1) and 6(1) RC as follows:

> 4(1) *Subject to rule 5(1), two or more persons may be joined together in one action as plaintiffs or defendants with the leave of the Court or where:*
>
> (a) *if separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions; and*
>
> (b) *all rights to relief claimed in the action (whether they are joint, several or alternative) are in respect of or arise out of the same transaction or series of transactions.*
>
> 5(1) *If claims in respect of two or more causes of action are included by a plaintiff in the same action or by a defendant in a counterclaim, or if two or more plaintiffs or defendants are parties to the same action, and it appears to the Court that the*

joinder of causes of action or of parties, as the case may be, may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient.

6(1) *A cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.*

(emphasis added)

[35] Order 15 r. 4(1) RC allows the plaintiffs to join all the defendants in this suit without leave of the court if two cumulative conditions are fulfilled, namely:

(a) there is a common question of law or fact; and

(b) the plaintiffs' rights to relief in this suit are in respect of or arise out of the same transaction or series of transactions.

For the above proposition, I rely on the following two Court of Appeal cases:

(i) Chan Nyarn Hoi JCA's judgment in *S Constantine v. Social Security Organisation (SOCSO) & Anor* [1998] 1 CLJ 433; [1998] 1 MLJ 160, at p. 163; and

(ii) the decision of Abdul Malek Ahmad JCA (as he then was) in *Lembaga Akitek Malaysia v. Cheah Kim Fah & Ors* [1999] 2 CLJ 937; [1999] 1 MLJ 669, at pp. 679 to 680.

[36] This court is satisfied that the joinder of all the defendants in this suit is proper under O. 15 r. 4(1) RC and does not require court's leave because the following two conditions in O. 15 r. 4(1)(a) and (b) RC have been fulfilled in this case:

(a) there are common questions of law and/or fact regarding:

(i) the 2010 Share Swap;

(ii) the 2011 Share Swap;

(iii) Suit No. 164; and

(iv) the consent judgment; and

(b) the plaintiffs' rights to relief in this case are in respect of or arise out of the same transaction or series of transactions.

[37] The above construction of O. 15 r. 4(1) RC is supported by the following reasons:

(a) a joinder of parties will ensure that there will not be unnecessary separate trials and all issues will be resolved expeditiously and economically in one trial; and

(b) if there are separate trials, there will always be a risk that different courts may arrive at conflicting findings of fact in respect of similar issues.

[38] Even if I have erred in applying O. 15 r. 4(1)(a) and (b) RC in respect of this suit, there is no prejudice occasioned to any of the defendants in this case. This is due to the following reasons:

(a) by virtue of O. 15 r. 6(1) RC, this suit "shall not be defeated by reason of the misjoinder" of parties. I refer to the two Court of Appeal decisions as follows:

(i) *Lembaga Akitek Malaysia*, at p. 680; and

(ii) Shaik Daud Ismail JCA's judgment in *Yeap Nah Khe & Ors v. Tye Cho Chun & Anor* [1999] 2 CLJ 726, at p. 730;

(b) Order 15 r. 4(1) RC is subject to O. 15 r. 5(1) RC. The defendants in this case have the right to apply to court under O. 15 r. 5(1) RC for separate trials in respect of the "double derivative suits" and the personal causes of action.

In *Kok Wee Kiat (MRS) v. Kuala Lumpur Stock Exchange Bhd & Ors* [1976] 1 LNS 52; [1977] 1 MLJ 109, at p. 111, Ali FJ in the Federal Court considered O. 18 r. 1 of the then applicable Rules of the Supreme Court 1957 (RSC) and held as follows:

> The Order, as it appears to me, was made under Order 18 rule 1 [RSC] which provides as follows:
>
> > Subject to the following Rules of this Order, the plaintiff may unite in the same action several causes of action; but if it appear to the court or a judge that any causes of action cannot be conveniently tried or disposed of together, the court or judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.
>
> *The learned judge has very wide powers under the Rules to make the Order which is nothing more than a direction that the trial of the action be conducted in a particular manner. As the learned judge will no doubt be hearing the action himself I do not think it is right or proper for this court to order that the trial be conducted in a manner different from what the learned judge has directed.*
>
> (emphasis added)

Based on *Kok Wee Kiat (MRS)* and O. 15 r. 5(1) RC, this court has a wide discretion to decide whether to order a joint or separate trial of the "double derivative suits" and the personal causes of action; and

(c) under O. 1A RC, the court "shall have regard to the overriding interest of justice and not only to the technical non-compliance with" RC. Order 2 r. 1(2) RC provides that RC "are a procedural code" which is "subject to the overriding objective of enabling the court to deal with cases

justly". It is clear that under O. 1A and O. 2 r. 1(2) RC, the court is mandated to decide cases justly without being shackled by contentions that there has been technical non-compliance with RC in respect of any alleged misjoinder of parties and/or alleged misjoinder of causes of action.

Second Inquiry

Various Factual Issues To Be Tried In This Suit

[39] After perusing all the affidavits filed in respect of these four applications, the following issues need to be tried in this case:

(a) whether there are oral agreements between Mr Ranjeet and Mr Shailen;

(b) if there are oral contracts between Mr Ranjeet and Mr Shailen, has Mr Shailen breached such contracts;

(c) whether Mr Shailen is the alter ego who controls and directs:

(i) Zavarco PLC;

(ii) Zavarco Bhd;

(iii) Open Fibre;

(iv) V Telecoms;

(v) Paneagle Holdings;

(vi) Vertu; and

(vii) Aries;

(d) whether the court should lift and pierce the corporate veil of Zavarco PLC, Zavarco Bhd, Open Fibre, V Telecoms, Paneagle Holdings, Vertu and Aries;

(e) whether Encik Zulizman, Puan Ku Hasniza, Puan Roslina, Tunku Mazlina, Encik Zarudin, Mr Teoh and Mr Vinai are nominees of Mr Shailen who are accustomed to act at the material times in accordance with Mr Shailen's directions and instruction;

(f) whether the consent judgment has been obtained by fraud or collusion by the defendants named in the SOC;

(g) whether Mr Shailen who controls Zavarco PLC and Zavarco Bhd has committed "fraud on the minority";

(h) whether the defendants named in the SOC have breached their fiduciary duties owed to Zavarco PLC and Zavarco Bhd;

(i) whether the defendants named in the SOC have committed the tort of conspiracy to defraud the court in Suit No. 164 (which recorded the consent judgment), Zavarco PLC and Zavarco Bhd. It is to be noted that

according to the recent Federal Court's judgment delivered by Richard Malanjum CJ (Sabah & Sarawak) in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 AMR 497, at paras. 48-53, an allegation of fraud, even if such an allegation concerns "criminal fraud", need only be proven on a balance of probabilities and not beyond all reasonable doubt;

(j) whether the defendants named in the SOC have committed the tort of conspiracy to injure and/or defraud the plaintiffs;

(k) whether legal privilege is excluded in this case by reason of fraud (as provided in proviso (b) to s. 126(1) EA). The effect of proviso (b) to s. 126(1) EA will be elaborated later in this judgment; and

(l) assuming the plaintiffs can prove any one or more of the six causes of action, what is the appropriate relief and is restitution possible?

[40] The fact that there are various issues to be tried in this case (as enumerated above), necessitates a dismissal of the four applications – the Federal Court's judgment given by Gopal Sri Ram JCA (as he then was) in *Lai Yoke Ngan*, at p. 588. This is the first reason why the second inquiry should be resolved in favour of the plaintiffs.

Are Plaintiffs Required To Obtain English Court's Permission To File "Double Derivative Suit" Against Zavarco PLC?

[41] Chapter 1 of Part 11 CA (UK) provides as follows:

PART 11

DERIVATIVE CLAIMS AND PROCEEDINGS BY MEMBERS

CHAPTER 1

DERIVATIVE CLAIMS IN ENGLAND AND WALES OR NORTHERN IRELAND

260 Derivative claims

(1) **This Chapter applies to proceedings in England and Wales or Northern Ireland by a member of a company:**

(a) in respect of a cause of action vested in the company, and

(b) seeking relief on behalf of the company.

This is referred to in this Chapter as a "derivative claim".

(2) A derivative claim may only be brought:

(a) under this Chapter, or

(b) in pursuance of an order of the court in proceedings under section 994 (proceedings for protection of members against unfair prejudice).

(3) *A derivative claim under this Chapter may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.*

The cause of action may be against the director or another person (or both).

(4) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.

(5) For the purposes of this Chapter:

(a) "director" includes a former director;

(b) a shadow director is treated as a director; and

(c) references to a member of a company include a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.

261 **Application for permission to continue derivative claim**

(1) *A member of a company who brings a derivative claim under this Chapter must apply to the court for permission (in Northern Ireland, leave) to continue it.*

(2) If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a *prima facie* case for giving permission (or leave), the court:

(a) must dismiss the application, and

(b) may make any consequential order it considers appropriate.

(3) If the application is not dismissed under subsection (2), the court:

(a) may give directions as to the evidence to be provided by the company, and

(b) may adjourn the proceedings to enable the evidence to be obtained.

(4) On hearing the application, the court may:

(a) give permission (or leave) to continue the claim on such terms as it thinks fit,

(b) refuse permission (or leave) and dismiss the claim, or

(c) adjourn the proceedings on the application and give such directions as it thinks fit.

262 Application for permission to continue claim as a derivative claim

(1) This section applies where:

(a) a company has brought a claim, and

(b) the cause of action on which the claim is based could be pursued as a derivative claim under this Chapter.

(2) A member of the company may apply to the court for permission (in Northern Ireland, leave) to continue the claim as a derivative claim on the ground that:

(a) the manner in which the company commenced or continued the claim amounts to an abuse of the process of the court,

(b) the company has failed to prosecute the claim diligently, and

(c) it is appropriate for the member to continue the claim as a derivative claim.

(3) If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a *prima facie* case for giving permission (or leave), the court:

(a) must dismiss the application, and

(b) may make any consequential order it considers appropriate.

(4) If the application is not dismissed under subsection (3), the court:

(a) may give directions as to the evidence to be provided by the company, and

(b) may adjourn the proceedings to enable the evidence to be obtained.

(5) On hearing the application, the court may:

(a) give permission (or leave) to continue the claim as a derivative claim on such terms as it thinks fit,

(b) refuse permission (or leave) and dismiss the application, or

(c) adjourn the proceedings on the application and give such directions as it thinks fit.

263 Whether permission to be given

(1) The following provisions have effect where a member of a company applies for permission (in Northern Ireland, leave) under section 261 or 262.

(2) Permission (or leave) must be refused if the court is satisfied:

(a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to continue the claim, or

(b) where the cause of action arises from an act or omission that is yet to occur, that the act or omission has been authorised by the company, or

(c) where the cause of action arises from an act or omission that has already occurred, that the act or omission:

A (i) was authorised by the company before it occurred, or

(ii) has been ratified by the company since it occurred.

(3) In considering whether to give permission (or leave) the court must take into account, in particular:

B (a) whether the member is acting in good faith in seeking to continue the claim;

(b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;

C (c) where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be:

(i) authorised by the company before it occurs, or

(ii) ratified by the company after it occurs;

D (d) where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;

E (e) whether the company has decided not to pursue the claim;

(f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company.

(4) In considering whether to give permission (or leave) the court shall F have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter.

(5) The Secretary of State may by regulations:

G (a) amend subsection (2) so as to alter or add to the circumstances in which permission (or leave) is to be refused;

(b) amend subsection (3) so as to alter or add to the matters that the court is required to take into account in considering whether to give permission (or leave).

(6) Before making any such regulations the Secretary of State shall H consult such persons as he considers appropriate.

(7) Regulations under this section are subject to affirmative resolution procedure.

264 Application for permission to continue derivative claim brought by another member

I (1) This section applies where a member of a company ("the claimant"):

(a) has brought a derivative claim,

(b) has continued as a derivative claim a claim brought by the company, or

(c) has continued a derivative claim under this section.

(2) Another member of the company ("the applicant") may apply to the court for permission (in Northern Ireland, leave) to continue the claim on the ground that:

(a) the manner in which the proceedings have been commenced or continued by the claimant amounts to an abuse of the process of the court,

(b) the claimant has failed to prosecute the claim diligently, and

(c) it is appropriate for the applicant to continue the claim as a derivative claim.

(3) If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a *prima facie* case for giving permission (or leave), the court:

(a) must dismiss the application, and

(b) may make any consequential order it considers appropriate.

(4) If the application is not dismissed under subsection (3), the court:

(a) may give directions as to the evidence to be provided by the company, and

(b) may adjourn the proceedings to enable the evidence to be obtained.

(5) On hearing the application, the court may:

(a) give permission (or leave) to continue the claim on such terms as it thinks fit,

(b) refuse permission (or leave) and dismiss the application, or

(c) adjourn the proceedings on the application and give such directions as it thinks fit.

(emphasis added).

[42] Regrettably, I cannot accede to the submission by Mr Lim and Mr Wong to strike out this suit on the ground that Chapter 1 of Part 11 CA (UK) requires permission of the English High Court for a derivative suit to be filed against, among others, Zavarco PLC, a company incorporated in England. My reasons are as follows:

(a) there is no requirement in our Companies Act 1965 (CA), RC or any other Malaysian written law for the English High Court's permission to be given before this suit can be filed against Zavarco PLC. Significantly, our CA has no provision equivalent to Chapter 1 of Part 11 CA (UK). Nor is there any Malaysian case which has struck out a suit based on Chapter 1 of Part 11 CA (UK);

(b) common law derivative suits against companies incorporated in Malaysia has been expressly preserved by s. 181A(3) CA. I refer to the definition of a "company" in s. 4(1) CA and s. 181A CA as follows:

> 4 Interpretation
>
> (1) In this Act, unless the contrary intention appears:
>
> ...
>
> **"company" means a company incorporated pursuant to this Act or pursuant to any corresponding previous enactment;**
>
> 181A **Proceedings on behalf of a company**
>
> (1) **A complainant may, with the leave of the Court, bring, intervene in or defend an action on behalf of the company.**
>
> (2) **Proceedings brought under this section shall be brought in the company's name.**
>
> (3) *The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is not abrogated.*
>
> (4) **For the purposes of this section and sections 181B and 181E, "complainant" means:**
>
> (a) **a member of a company**, or a person who is entitled to be registered as member of a company;
>
> (b) a former member of a company if the application relates to circumstances in which the member ceased to be a member;
>
> (c) any director of a company; or
>
> (d) the Registrar, in case of a declared company under Part IX.
>
> (emphasis added)

In *Abdul Rahim Suleiman & Anor v. Faridah Md Lazim & Ors* [2015] 1 LNS 313; [2015] 4 MLRH 191, at p. 250, I have decided as follows in dismissing an application for leave under s. 181A CA:

> 106. *The dismissal of the OS does not prevent the Plaintiffs from filing a derivative suit based on Malaysian case law - s 181A(3) CA and Abdul Rahim bin Aki.* It is to be noted that s 236(3) [Australian Corporations Act 2001] [unlike our s 181A(3) CA] has abolished the Common Law right of a complainant to bring a derivative action in Australia.
>
> (emphasis added)

Malaysian case law, such as *Abdul Rahim Aki* and *Abdul Rahim Suleiman*, has recognised common law derivative suits against companies incorporated in Malaysia without leave of Malaysian court.

This suit has been filed against, among others, Zavarco Bhd. There is no requirement for leave of Malaysian court under s. 181A(3) CA for the plaintiffs to file a "derivative suit" against Zavarco Bhd. Both Mr Lim and

Mr Wong have applied to strike out this suit against all their clients, including Zavarco Bhd. If I have applied Chapter 1 of Part 11 CA (UK) and/or the principle of *lex incorporates* to strike out this suit against Zavarco Bhd, this will be contrary to both s. 181A(3) CA and Malaysian case law which have allowed the institution of common law "derivative suits" against companies incorporated in Malaysia (such as Zavarco Bhd) without leave of Malaysian courts;

(c) As elaborated above, this suit has pleaded two personal causes of action, namely:

(i) breach of oral agreements between Mr Ranjeet and Mr Shailen; and

(ii) tort of conspiracy by unlawful means to injure the plaintiffs and/or tort of conspiracy to defraud the plaintiffs.

Even if it is assumed that Chapter 1 of Part 11 CA (UK) applies in this case, the pleading of the above causes of action *in personam* in the SOC, in itself, merits this suit going to trial;

(d) A literal reading of s. 260(1) CA (UK) clearly shows that Chapter 1 of Part 11 CA (UK) is confined to derivative suits filed in England, Wales and Northern Ireland. There is nothing in Chapter 1 of Part 11 CA (UK) or any part of CA (UK) to indicate that Chapter 1 of Part 11 CA (UK) has extra-territorial effect on derivative suits filed outside England against companies incorporated in England. Nor is there anything in Chapter 1 of Part 11 CA (UK) which prohibits the filing of a derivative action in a non-English court against a company incorporated in England without the permission of English court;

(e) Section 260(3) CA (UK) shows that Chapter 1 of Part 11 CA (UK) envisages a "derivative claim" "only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust". In this suit, the "double derivative suit" is based on, among others, a statutory right under s. 44 EA to set aside the consent judgment on the ground of fraud and/or collusion. I do not therefore see how Chapter 1 of Part 11 CA (UK) can constitute a ground to strike out this suit which is based on, among others, s. 44 EA;

(f) Chapter 1 of Part 11 CA (UK) does not apply to "double derivative actions" such as this suit. I rely on *Re Fort Gilkicker Ltd*, at pp. 556-557, as follows:

Conclusion

[44] *I have come on balance to the conclusion that the [CA (UK)] did not do away with the multiple derivative action. My reasons follow. First, there was before 2006 a common law procedural device called the derivative action by which the court could permit a person or persons with the closest sufficient interest*

to litigate on behalf of a company by seeking for the company relief in respect of a cause of action vested in it. Those persons would usually be a minority of the company's members, but might, if the company was wholly owned by another company, be a minority of the holding company's members. These were not separate derivative actions, but simply examples of the efficient application of the procedural device, designed to avoid injustice, to different factual circumstances.

[45] *In 2006 Parliament identified the main version of that device, namely where locus standi is accorded to the wronged company's members, labelled it a 'derivative claim' and enacted a comprehensive statutory code in relation to it. As a matter of language, s 260 applied Ch 1 of Pt 11 only to that part of the old common law device thus labelled, leaving other instances of its application unaffected.*

[46] *Applying the well established relevant principle of construction, Parliament did not expressly abolish the whole of the common law derivative action in relation to companies, even though by implication from the comprehensiveness of the statutory code it did do so in relation to derivative claims by members (as defined) of the wronged company. Beyond that, the assertion that the remainder of the common law device was abolished fails because abolition was neither express nor a clear or necessary implication.*

(emphasis added);

(g) Section 57(1)(b) EA allows the court to take judicial notice of United Kingdom's Acts of Parliament. As explained above, I am satisfied that a literal reading of Chapter 1 of Part 11 CA (UK) does not indicate its application to a "double derivative action", such as this case.

The learned views expressed in Morgan's opinion and Pepperall's opinion concern the effect of English law in respect of the construction of Chapter 1 of Part 11 CA (UK) (opinions on English law). I do not think s. 57(1)(b) EA allows me to take judicial notice of opinions on English law. If otherwise, this will be a dangerous precedent as opinions on English law by former English judges, Queen's counsel and academicians on English law (experts on English law) have to be received by our courts without giving a right to the opposing party to cross-examine the experts on English law. I refer to Mah Weng Kwai JC's (as he then was) judgment in the High Court case of *Southern Acids (M) Bhd v. Standard Chartered Bank Malaysia Bhd* [2012] 2 CLJ 361, at p. 375, as follows:

Pursuant to cl. 13(a) of the Master Agreement, the parties have contractually agreed that the governing law of the Master Agreement is English law. The plaintiff does not dispute this. If the case is heard in Malaysia, the Court cannot take judicial notice of English law. It has to be proven as a matter of fact through expert witnesses on the law under the provisions of s. 45 of the Evidence Act 1950.

(emphasis added).

I am of the view that what constitutes English law is a question of fact to be proven at a trial by way of oral evidence to be given by the experts on English law in accordance with ss. 45(1), 46 and 51 EA. I reproduce ss. 45, 46 and 51 EA:

> **Opinions of experts**
>
> 45(1) **When the court has to form an opinion upon a point of foreign law** or of science or art, or as to identity or genuineness of handwriting or finger impressions, **the opinions upon that point of persons specially skilled in that foreign law**, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, **are relevant facts.**
>
> (2) **Such persons are called experts.**
>
> Facts bearing upon opinions of experts
>
> 46. **Facts not otherwise relevant are relevant if they support or are inconsistent with the opinions of experts when such opinions are relevant.**
>
> **Grounds of opinion when relevant**
>
> 51. **Whenever the opinion of any living person is relevant, the grounds on which his opinion is based are also relevant.**
>
> (emphasis added).

Based on the above reasons, at this interlocutory juncture, I cannot accept Morgan's opinion and Pepperall's opinion. This suit has to be tried and the following has to be proven by way of oral evidence:

(i) the witness' expertise in the branch of English law concerning "double derivative suits" filed outside England against companies incorporated in England; and

(ii) the reasons supporting or opposing the witness' expert opinion; and

(h) even if I have erred in respect of the above matters, the issues of law regarding the application of Chapter 1 of Part 11 CA (UK) and/or the principle of *lex incorporates* in this case, require serious argument and mature consideration which merit a trial – please see Gopal Sri Ram JCA's (as he then was) judgment in the Federal Court case of *Lai Yoke Ngan*, at p. 588 (which was concurred by Mohd Azmi FCJ, at p. 576). Accordingly, the above questions of law can only be disposed off after the trial of this suit. On this ground alone, Court Encl. Nos. 14 and 25 should be declined.

[43] I accept Encik Izral's submission that *Wong Ming Bun, East Asia Satellite Television (Holdings) Ltd*, *Nigel Gray* and *Microsoft Corporation* may be explained on the ground that these cases concerned s. 184C BCA (BVI), in particular s. 184C(6) BCA (BVI). Section 184C(6) BCA (BVI) expressly requires leave of BVI court to be obtained before a shareholder of a company

incorporated in BVI can file a derivative suit in BVI or any other country against a company incorporated in BVI. Section 184C BCA (BVI) provides as follows:

> Derivative actions
>
> 184C(1) Subject to subsection (3), the Court may, on the application of a member of a company, grant leave to that member to:
>
> (a) bring proceedings in the name and on behalf of that company; or
>
> (b) intervene in proceedings to which the company is a party for the purpose of continuing, defending or discontinuing the proceedings on behalf of the company.
>
> (2) Without limiting subsection (1), in determining whether to grant leave under that subsection, the Court must take the following matters into account:
>
> (a) whether the member is acting in good faith;
>
> (b) whether the derivative action is in the interests of the company taking into account of the views of the company's directors on commercial matters;
>
> (c) whether the proceedings are likely to succeed;
>
> (d) the costs of the proceedings in relation to the relief likely to be obtained; and
>
> (e) whether an alternative remedy to the derivative claim is available.
>
> (3) Leave to bring or intervene in proceedings may be granted under subsection (1) only if the Court is satisfied that:
>
> (a) the company does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or
>
> (b) it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders or members as a whole.
>
> (4) Unless the Court otherwise orders, not less than twenty eight days notice of an application for leave under subsection (1) must be served on the company and the company is entitled to appear and be heard at the hearing of the application.
>
> (5) The Court may grant such interim relief as it considers appropriate pending the determination of an application under subsection (1).
>
> (6) **Except as provided in this section, a member is not entitled to bring or intervene in any proceedings in the name of or on behalf of a company.** (emphasis added)

It is to be noted that our CA has no provision which is equivalent to s. 184C(6) BCA (BVI). In *Novatrust Ltd*, at para. 33, Pelling QC (sitting as a High Court Judge) has decided that CA (UK) has no provision which is similar to s. 184C(6) BCA (BVI).

[44] In *Prudential Assurance Co Ltd (No 2)*, at p. 365, the English Court of Appeal has decided that the question of whether a plaintiff has *locus standi* to bring a derivative action, should be determined as a preliminary issue. In this case, for reasons expressed above, I am satisfied that the plaintiffs have *locus standi* to file this "double derivative action", especially under s. 44 EA.

[45] In respect of the decisions of the Delaware Court in *Sternberg* and *Microsoft Corporation*, I am not inclined to accept the approach of the American courts in respect of "double derivative suits" and "multiple derivative suits". I rely on Lord Millet NPJ's judgment in *Waddington Ltd*, at pp. 100-101, as follows:

> [65] *The multiple derivative action has been recognised in many states of the United States, but the legal basis on which the action is maintainable has varied from state to state and from time to time. Many of the grounds upon which the action has been rationalised would not be accepted in either England or Hong Kong*. In some cases the subsidiary has been treated as a mere instrument, agent or alter ego of the parent company; in others the corporate structure has been described as a fiction or 'specious and illusory device' allowing the court to pierce the corporate veil. In the absence of special circumstances it is not permissible to adopt such an approach in Hong Kong. In *Brown v Tenney* (1988) 532 NE 2d 230, the Supreme Court of Illinois analysed the double derivative action as really consisting of two actions, one by the shareholders against the directors of the parent company for breach of their fiduciary duty in failing to bring an action against the wrongdoers, and the other to vindicate a right vested in the subsidiary. *The analysis assumes that a director of a company owes fiduciary duties to the shareholders, which appears be the case in Illinois but is not the law in England or Hong Kong.*
>
> [66] *While the United States cases are therefore of little assistance in deciding whether a multiple derivative action is maintainable in Hong Kong, they are helpful in demonstrating that it should be. In Brown v Tenney the Appellate Court of Illinois observed that in the absence of such an action the additional layer in the corporate structure would 'prevent the righting of many wrongs and would insulate the wrongdoer from judicial intervention'.*
>
> In *Holmes v Camp* (1917) 219 NY 359 the Supreme Court of New York said that:
>
> > The free use of holding companies which has grown up in recent years would prevent the righting of many wrongs if an action like the present might not be maintained by a stockholder of a holding company.
>
> If this was true of New York in 1917 it is certainly no less true of Hong Kong in 2008.
>
> [67] **But it is not necessary to travel to the United States to appreciate the need for a multiple derivative action to be maintainable.**
>
> (emphasis added).

[46] Mr Lim relied on the following judgment in *Sternberg*:

> The same logic has been held to apply in a double derivative suit. *Levine v Milton*, Del. Ch. 219 A.2d 145, 146 (1966). *The parent corporation is an indispensable party to a double derivative suit against a subsidiary because any recovery for losses suffered by the subsidiary that were being sued upon would go to the parent. Thus, the Court of Chancery was correct in concluding that if it did not have jurisdiction over the parent corporation, the entire double derivative suit must be dismissed. Steinberg v O'Neil 532 A.2d at 998-999.*
>
> (emphasis added).

With respect, I am unable to agree with the above judgment in *Sternberg* for the following reasons:

(a) as explained above, this court has jurisdiction over Zavarco PLC because Zavarco PLC has a statutory right under s. 44 EA to apply to this court to set aside the consent judgment. Hence, it is clear that this court has jurisdiction over Zavarco PLC; and

(b) even if it is assumed that this court has no jurisdiction over Zavarco PLC, this does not necessarily mean that the court has no jurisdiction over Zavarco Bhd. Once again, as elaborated above, Zavarco Bhd has a statutory right under s. 44 EA to apply to court to set aside the consent judgment and as such, this court has jurisdiction over Zavarco Bhd.

[47] The following cases cited by Mr Lim can be distinguished from this case:

(a) in *Re Fort Gilkicker Ltd*, at p. 551, there was an application for permission of the English court under Chapter 1 of Part 11 CA (UK) to continue a derivative action against a company incorporated in England; and

(b) *Konamaneni*, at p. 982, concerned a derivative action filed in England in respect of a company incorporated in India. The following three issues which arose in *Konamaneni*, at p. 990, are not relevant to this case:

> IV. THE FOREIGN ELEMENT
>
> ...
>
> [37] Three questions arise: (a) does the English court have jurisdiction in a derivative claim on behalf of a foreign company? (b) if so, what law applies to determine whether a derivative claim can be brought? (c) if there is jurisdiction, and the applicable law permits a derivative claim, how do forum *conveniens* rules apply in the context of applications to stay proceedings or to set aside service outside the jurisdiction?
>
> (emphasis added).

Should This Suit Be Struck Out Because Plaintiffs' Locus Standi Has Been Challenged In Suit No. 131?

[48] I am not able to accept the contention that this suit should be struck out on the ground that the *locus standi* of the plaintiffs as members of Zavarco PLC has been challenged in Suit No. 131. My reasons are as follows:

(a) in view of the Court of Appeal's decision, there is presently no lawful restraint on the plaintiffs' exercise of their rights as shareholders of Zavarco PLC; and

(b) if this court has acceded to the above contention, a derivative suit may be unlawfully stifled by the mere filing of a suit to challenge the rights of the plaintiff (who has filed the derivative action) as a shareholder of the company in question.

Should SOC Be Struck Out On The Ground That Restitutionary Remedy Is Not Available?

[49] Both Mr Lim and Mr Wong have contended that Zavarco PLC is unable to reimburse Open Fibre and since restitution as a relief is not available, this suit should thus be struck out. This argument is not accepted by this court for the following reasons:

(a) paragraph 102.1.1 SOC prays for a declaration that the transfer of all ordinary shares in V Telecoms to Open Fibre or any other party through the consent judgment, is null and void (prayer for declaration). In *Charles Koo Ho-Tung & Ors v. Koo Lin Shen & Ors* [2015] 1 LNS 755; [2015] AMEJ 1046, in para. 33(d), I have dismissed an application to strike out an originating summons which has a prayer for declaration:

> 33(d) *the High Court has very wide discretionary powers to grant declarations under s 41 of the Specific Relief Act 1950 (SRA) and Order 15 rule 16 RC, despite the fact that a plaintiff has no:*
>
> (i) ***locus standi* to sue**; and
>
> (ii) **cause of action**.
>
> I rely on the following cases:
>
> (1) in *Al Rashidy Kassim & Ors v Rosman Roslan* [2007] 3 CLJ 361, at 375, Arifin Zakaria FCJ (as His Lordship then was) decided as follows in the Federal Court:
>
> > *We are of the view that all the circumstances of the case ought to be considered by the court in arriving at a just result. Secondly, following Re Atkinson and Omar Ali bin Mohd., we think the beneficiary has at least an equity in the estate of the deceased to entitle the beneficiary to seek on behalf of the estate the remedy of a declaratory judgment*.
> >
> > (emphasis added);

(2) the Court of Appeal's judgment in *Dato' Raja Ideris bin Raja Ahmad & Ors v Teng Chang Khim (Chairman of the select Committee on Competence, Accountability and Transparency and the Chairman of the Committee of Rights and Privileges State Legislative Assembly of Selangor) & Ors* [2012] 5 MLJ 490, at 498 and 499-500, delivered by Low Hop Bing JCA as follows:

> [25] The question raised in the aforesaid submissions may be formulated as follows:
>
> *Upon a true construction of s 41 [SRA] and O 15 r 16, where the OS prays for a declaratory judgment in the form of declarations, is it proper to strike out the OS on the ground that it discloses no reasonable cause of action?*
>
> ...
>
> [28] *A declaratory judgment merely states the rights or legal position of the parties as they stand without altering them in any way: see Gan Hwa Kian & Anor v Shencourt Sdn Bhd [2007] 4 MLJ 554. 'A declaration can be used to ascertain and determine the legal rights of parties or to determine a point of law': Brett Andrew Macnamara v Kam Lee Kuan [2008] 2 MLJ 450 at p 459 per Balia Yusof J (now JCA). By virtue of s 41 and O 15 r 16, the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion. The court has power to grant a declaration irrespective of whether an application has a cause of action or not and even if a cause of action does not exist at the time of the filing of an application: see eg Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, intervener) [1995] 2 MLJ 421; BSN Commercial Bank (M) Bhd v Pentadbir Tanah Daerah, Mersing [1997] 5 MLJ 288; and Cekal Berjasa Sdn Bhd v Tenaga Nasional Bhd [2006] 4 MLJ 284 at p 294, per Abdul Malik Ishak J (now JCA).*
>
> [29] *The jurisdiction to make a declaration under the rule is not confined to cases in which the plaintiff has a complete and subsisting cause of action: Guaranty Trust Co of New York v Hannay [1915] 2 KB 536 (CA) (Eng); Dewan Singh v M Thynappa Ltd & Yeo Teck Chiang [1939] MLJ 278; Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases [1983] 2 MLJ 227 (FC); Karpal Singh v Sultan of Selangor [1988] 1 MLJ 64; and Tengku Mariam binte Tengku Sri Wa Raja & Anor v Commissioner for Religious Affairs, Terengganu & Ors [1969] 1 MLJ 110. Our answer to the question set out in para [25] is in the negative.*
>
> CONCLUSION
>
> [30] *Based on the foregoing grounds, we allow this appeal, set aside the striking out order of the High Court and substitute it with an order that the OS be reinstated and remitted to the High Court and, with the utmost respect, to be heard and disposed of on merits before another judge.*

(emphasis added); and

(3) in *Dr. Mahesan & Ors v Ponnusamy & Ors* [1994] 3 MLJ 312, at 323, 324 and 326, Zakaria Yatim J (as His Lordship then was) held as follows:

> Mr Thangaraj [plaintiff's learned counsel] asked the court to declare that the allotment of shares is null and void. However the originating summons does not contain any prayer to that effect.
>
> Mr Thangaraj, then asked for leave to amend the originating summons to include a Prayer For Declaration that the allotment of shares at the board meeting held on 14 May 1994 is null and void. Mr Ong [defendant's learned counsel] objected to the application for amendment.
>
> ...
>
> *The question to be considered here is whether the court has the power to make an order declaring that the allotment of shares at the board of directors meeting held on 14 May 1994 is null and void.*
>
> ...
>
> *From the three cases cited above, it is clear that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion.*
>
> *The court has the power to grant a declaration irrespective of whether the applicant has a cause of action or not. The court has the discretion to grant a declaration even if the cause of action does not exist at the time of the filing of the application.*
>
> ...
>
> *The decision on the allotment of shares would deprive Dr Mahesan and Dr Ampikai of a substantial amount of their shares in the company. I think it is necessary for the court to exercise its discretion to grant the declaration. The question of amending the originating summons does not arise here.*
>
> (emphasis added)
>
> *Based on Al Rashidy Kassim, Dato' Raja Ideris and Dr. Mahesan, even if the 1st to 3rd Plaintiffs do not have the necessary locus standi under s 181 CA, the 1st to 3rd Plaintiffs as beneficiaries of KLC's estate, are entitled to apply for declarations in this case and as such, the OS should not be struck out.*

(emphasis added).

A The above decision in *Charles Koo Ho-Tung (No 1)* has been affirmed by the Court of Appeal. In view of the prayer for declaration, even if it is assumed that this court cannot order restitution in this case, this suit should not be struck out;

B (b) besides the prayer for declaration, the SOC has also applied for, among others, the following redress:

(i) the setting aside of the consent judgment (para. 102.1.1 SOC); and

(ii) compensatory and exemplary damages (paras. 102.1.6(i), (ii) and 102.8 SOC) (prayer for damages).

C Even if it is assumed that restitution is not possible in this case, this suit can still proceed in respect of the above prayers for the setting aside of the consent judgment and prayer for damages; and

(c) whether restitutionary remedy is available or not in a particular case, D should be decided after all the evidence has been adduced at trial. The court is only able to exercise its discretion judicially to award any appropriate relief (including restitution) after ascertaining the factual position at the conclusion of trial. At this interlocutory stage, it is neither appropriate nor just to decide based solely on affidavit evidence whether restitution can be given or otherwise. A *fortiori* it is E inappropriate and unjust to strike out a suit merely on an averment in an affidavit that restitution is impossible (no matter how "convincing" the sworn allegation may be). I am unable to find any case in Malaysia and in other common law countries which has struck out a suit solely on the ground that the remedy of restitution cannot be granted.

F **[50]** All the cases cited by Mr Lim and Mr Wong (defendants' cases) may be distinguished on one or more of the following grounds:

(a) the defendants' cases do not concern a SOC which has pleaded both "double derivative suit" and personal causes of action (such as this case); G and/or

(b) the following judgments of the defendants' cases have clearly indicated that those cases have been tried and not struck out:

(i) *Dream Property Sdn Bhd*, at p. 452;

H (ii) *Travelsight (M) Sdn Bhd*, at p. 6;

(iii) *Thorpe*, at p. 657;

(iv) *The Sheffield Nickel and Silver Plating Company Ltd*, at p. 215; and

(v) *Lagunas Nitrate Company*, at p. 392.

I

Should This Suit Be Struck Out On Illegality?

[51] Mr Lim has submitted that the alleged oral collateral agreement between Mr Ranjeet and Mr Shailen constitutes an illegal arrangement to defraud the registered ordinary shareholders of Zavarco PLC and the three preference shareholders of Open Fibre. As such, according to Mr Lim, this suit should be struck out on illegality. With respect, I am not able to accept this contention. This is because firstly, whether the alleged oral collateral agreement between Mr Ranjeet and Mr Shailen constitutes an illegal arrangement to defraud the registered ordinary shareholders of Zavarco PLC and the three preference shareholders of Open Fibre, is a question of fact which should be tried in this suit. Secondly, it is not plain and obvious to strike out this suit on the aforesaid alleged illegality.

Does This Suit Constitute An Abuse Of Court Process?

[52] Mr Lim has contended that Mr Ranjeet's stand in the winding up petition is inconsistent with his position in this suit (alleged inconsistency). According to Mr Lim, the alleged inconsistency not only shows bad faith on Mr Ranjeet's part (alleged bad faith) but also indicates that this suit constitutes an abuse of court process (alleged abuse of court process) which should be struck out by this court. Mr Wong has submitted that this suit is a mere afterthought because the plaintiffs took no action after allegedly discovering the consent judgment. Furthermore, this suit was only instituted after Mr Ranjeet has filed the winding up petition.

[53] I am not able to accept alleged inconsistency, alleged bad faith and alleged abuse of court process as grounds to strike out this suit. This decision is premised on the following reasons:

(a) The plaintiffs have denied the alleged inconsistency, alleged bad faith and alleged abuse of court process on affidavit evidence. As such, whether the alleged inconsistency, alleged bad faith and alleged abuse of court process are true or otherwise, are triable issues which necessitate a dismissal of Court Encl. Nos. 14 and 25;

(b) A SOC which has pleaded six causes of action (as in this case), should not be struck out on the grounds of alleged inconsistency, alleged bad faith and alleged abuse of court process; and

(c) it is not a plain and obvious case to strike out this suit on the grounds of alleged inconsistency, alleged bad faith and alleged abuse of court process.

[54] If alleged bad faith and alleged abuse of court process are proven after the trial of this suit, the defendants will have sufficient recourse against the plaintiffs (as explained later in this judgment).

Should Action Against Defendant Lawyers Be Struck Out For Insufficient Particulars Of Fraud And/Or Conspiracy To Defraud?

[55] Both learned counsel for the defendant lawyers have contended that the SOC has failed to particularise against the defendant lawyers' allegations of fraud and/or conspiracy to defraud. On behalf of Messrs Yahya, Mr Robert Low has submitted that the plaintiffs have not pleaded sufficient particulars regarding Messrs Yahya's knowledge or state of mind.

[56] The relevant part of O. 18 r. 12 RC reads as follows:

> Particulars of pleading
>
> Order 18 rule 12
>
> (1) Subject to paragraph (2), **every pleading shall contain the necessary particulars of any claim,** defence or other matter pleaded **including, without prejudice to the generality of the foregoing words**:
>
> (a) **particulars of any** misrepresentation, **fraud**, breach of trust, wilful default or undue influence on which the party pleading relies; and
>
> (b) **where a party pleading alleges any condition of the mind of any person**, whether any disorder or disability of mind or any malice, **fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.**
>
> ...
>
> (3) **The Court may order a party to serve on any other party particulars of any claim,** defence or other matter stated in his pleading, or in any affidavit of his to stand as a pleading, or a statement of the nature of the case on which he relies, **and the order may be made on such terms as the Court thinks just**.
>
> (4) *Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of paragraph (3), the Court may, on such terms as it thinks just, order that party to serve on any other party:*
>
> (a) **where he alleges knowledge, particulars of the facts on which he relies**; and
>
> (b) where he alleges notice, particulars of the notice.
>
> (emphasis added).

[57] I am not persuaded to strike out this suit on the technical ground that the SOC is defective in respect of pleadings against the defendant lawyers. My reasons are as follows:

(a) Paragraph 96 SOC has alleged that the defendant lawyers have knowingly assisted and/or participated to carry out and/or executed the alleged conspiracy (pleaded in paras. 12, 13, 79 to 82, 92 to 95, 98 and

99 SOC). In my view, these paragraphs in SOC against the defendant lawyers are sufficient to comply with O. 18 r. 12(1)(a) and (b) RC;

(b) In *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 2 CLJ 886; [1999] 5 MLJ 558, at pp. 898 and 899 (CLJ); pp. 570 and 571 (MLJ), Abdul Malik Ishak J (as he then was) held in the High Court as follows:

The issues of the day and which called for deliberation are two folds:

(1) *whether the plaintiff was required to plead exactly the circumstances which led to the second defendant having knowledge of the fraud perpetrated by the first defendant; ...*

The first issue

In regard to the first issue, Mr Clarence Edwin, learned counsel for the plaintiff, rightly argued rather eloquently that it would be next to impossible for any person in the plaintiff's position to be able to give details of information within the personal knowledge of the second defendant which would give rise to a constructive trust. Indeed, the plaintiff could not even venture a conjecture on the kind of knowledge which the defendant had as the 'state of a man's mind would be as much a fact as the state of his indigestion'. Evidence of this nature can only be elicited at a trial by viva voce evidence where witnesses for the respective parties would be able to testify to their hearts' content. Clearly, it would be a denial of justice if the plaintiff was not permitted to adduce evidence at the trial proper. The paramount function and duty of the courts would be to see that justice is done in all cases to all parties. ...

(emphasis added)

Pet Far Eastern (M) Sdn Bhd, in my view, illustrates the importance of not over-emphasising the importance of pleading at the expense of justice. As explained above, with the introduction of O. 1A and O. 2 r. 1(2) RC, the court "shall have regard to the overriding interest of justice and not only to the technical non-compliance with" O. 18 r. 12(1)(a) and (b) RC.

At this juncture, I refer to an English case cited by Encik Izral which has pragmatic value in respect of pleadings in respect of fraud and conspiracy. Warren J decided as follows in the English High Court case of *Revenue and Customs Comrs v. Sunico A/S & Ors* [2012] EWHC 4156, at paras. 3 and 6-8:

> [3] There are a number of applications with which I have to deal: an application by Dayal under CPR 24 for an order dismissing the claims against him; an application by Nari under CPR Pt 24 for an order dismissing the claims against him, further or alternatively, an order striking out the Amended Particulars of Claim insofar as they refer to him pursuant to CPR Pt 3, r 3.4(2) on the basis that they disclose no reasonable grounds for bringing the claim against him and/or are an abuse of the court's process and/or are otherwise likely to obstruct the just disposal of the proceedings; an application by HMRC to re-amend the Amended Particulars of Claim.
>
> ...

A

[6] **I start with the relevant principles. In relation to the pleading of fraud** and also in relation to the granting of summary judgment, I do so only very briefly since there is no dispute about the applicable principles. *The relevant principles in relation to pleading fraud can be sufficiently derived from Armitage v Nurse [1997] EWCA Civ 1279 (in particular, the judgment of Millett LJ); Mullarkey v Broad [2007] EWHC 3400 (Ch), [2008] 1 BCLC 638) (Lewison J, upheld by the Court of Appeal); Fattal v Walbrook Trustees (where the same judge cited from Three Rivers District Council v Bank of England [2003] 2 AC 1, [2000] 3 All ER 1, [2000] 2 WLR 1220) and the recent decision of Seaton v Seddon [2012] EWHC 735 (Ch), [2013] 1 All ER 29, [2012] 1 WLR 3636 (where Roth J provided a full analysis of the requirements). It is not through idleness that I do not carry out the same exercise, but rather from the absence of anything useful to add and a desire to avoid cluttering the authorities with yet more material that lawyers would feel it necessary to read and to cite.*

B

C

[7] *I do, however, draw attention to two separate aspects of the requirements relating to the pleading of fraud. The first is that there must be an express allegation of fraud. The words "fraud" or "dishonesty" do not have to be used. The use of words which are inconsistent with the absence of fraud and dishonesty is enough. It is enough, therefore, to plead that the Defendant was party to an unlawful means of conspiracy since such involvement is wholly inconsistent with an absence of fraud or dishonesty. It is in this sense I consider that the authorities tell us that there is no proper pleading of fraud if the pleaded facts are consistent with the absence of fraud or dishonesty. …*

D

E

[8] *But simply to allege fraud or knowledge is not enough. The second requirement in a fraud case is that a Defendant is entitled to know from the pleadings the fraud which he is alleged to have perpetrated and the allegations as to facts which are made against him in order to establish the fraud alleged. Since knowledge is the essence of fraud, he is entitled to particulars of knowledge. It is however a rare case where direct evidence of knowledge of fraud can be adduced. It would be a stroke of the most extreme luck for a Claimant to find, for instance, a letter passing between conspirators setting out the detail of their plot. Usually the knowledge of a Defendant is to be inferred from all of the facts. Accordingly, a plea of fraud is certainly not to be struck out on a pleading point if, first of all, fraud or dishonesty and, secondly, the primary factor relied on at the time of the inference and, thirdly, the extent of the knowledge of the fraud could be said to be inferred or alleged.*

F

G

(emphasis added);

H

(c) The defendant lawyers are not lay persons. In fact, the defendant lawyers are litigators who have acted in Suit No. 164. I do not see how the defendant lawyers can be prejudiced in any manner by the SOC, especially when the defendant lawyers have filed their defences in this suit. Furthermore, during the many pre-trial case management of this suit under O. 34 RC, the defendant lawyers did not complain to the court that the SOC was defective in respect of the averments against the defendant lawyers;

I

(d) If there is any real prejudice to the defendant lawyers due to the lack of particulars in the SOC, I would have expected the solicitors for the defendant lawyers to request for further and better particulars of the SOC (FBP) from the plaintiffs' solicitors before the filing of the defences for the defendant lawyers. However, no request for FBP has ever been made by the solicitors for the defendant lawyers. Nor have the defendant lawyers file any application to court under O. 18 r. 12(3) and (4) RC for a court order to compel the plaintiffs to supply FBP to the defendant lawyers; and

(e) even if it is assumed that there has been a non-compliance with O. 18 r. 12(1)(a) and (b) RC, I will exercise my discretion to treat such a non-compliance as a mere irregularity which is curable under O. 2 r. 1(1) and (3) RC. This is because, as explained above, there is no prejudice to the defendant lawyers which has been caused by any technical breach of O. 18 r. 12(1)(a) and (b) RC, especially when the defendant lawyers have filed their defences.

In *Charles Koo Ho-Tung*, at paras. 27 and 28, I have decided as follows:

> 27. In the event that I have erred and the OS is defective for being a "hybrid" OS which is contrary to *Lai Kim Loi*, I am of the view that such a defect is merely an irregularity which has not prejudiced the Defendants. Accordingly, I exercise my discretion to cure such an irregularity under Order 2 rule 1(1) and (3) RC. Order 2 rule 1(1) and (3) RC state as follows:
>
> Order 2
>
> rule 1(1) **Where, in beginning** or purporting to begin *any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been non-compliance with the requirement of these Rules, the non-compliance shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*
>
> ...
>
> 1(3) *The Court or Judge may, on the ground that there has been such non-compliance as referred to in paragraph (1), and on such terms as to costs or otherwise as it or he thinks just, bearing in mind the overriding objective of these Rules, exercise its or his discretion under these Rules* to allow such amendments, if any, to be made *and to make such order, if any, dealing with the proceedings generally as it or he thinks fit in order to cure the irregularity.*
>
> (emphasis added).
>
> It is to be noted that Order 2 rule 1(3) RC is materially different from Order 2 rule 1(2) [Rules of the High Court 1980] as Order 2 rule 1(3) RC expressly requires the court to consider the "overriding objective" of RC (for the court to deal with cases justly) embodied in Order 2

rule 1(2) RC. Once again, *Lai Kim Loi* was decided before the introduction of Order 2 rule 1(3) RC. At this juncture, it is apt for me to refer to Suffian LP's judgment in *Tan Chwee Geok*, at p. 189, as follows:

> **The [RSC] are intended to facilitate, not impede, the administration of civil justice.**
>
> *In the bad old days in England from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities.*
>
> *But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.*
>
> This changed attitude was reflected in the remarks of Lord Collins M.R. about 70 years ago in *Re Coles and Ravenshear* [1907] 1 KB 1, 4:
>
> > *Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.*
>
> Today O.70 r. 1 of our Rules [RSC] [now replaced by Order 2 rule 1(1) and (3) RC] explicitly states that non-compliance with our Rules:
>
> > **shall not render any proceedings void unless the court or a judge shall so direct …**
>
> (emphasis added).

28. This court exercises its discretion under Order 2 rule 1(1) and (3) RC to cure any non-compliance in respect of the OS because there is no prejudice to the Defendants occasioned by the way the OS is drafted. The fact that the Defendants have not been prejudiced by the contents of the OS is borne by the numerous, detailed and lengthy affidavits filed by the Defendants to resist the OS.

Should This Suit Be Struck Out Against Defendant Lawyers Because Of Legal Privilege?

[58] For the defendant lawyers, both Mr Wong Hok Mun and Mr Robert Low have submitted that the defendant lawyers are bound by legal privilege and cannot disclosed legally privileged communication between the defendant lawyers and their clients. As such, the defendant lawyers are unable to defend themselves in this suit and this suit should accordingly be struck out.

[59] Sections 23 and 126 to 129 EA provide as follows:

Admissions in civil cases when relevant

23. *In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.*

Explanation - Nothing in this section shall be taken to exempt any advocate from giving evidence of any matter of which he may be compelled to give evidence under section 126.

Professional communications

126(1) *No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:*

Provided that nothing in this section shall protect from disclosure:

(a) **any such communication made in furtherance of any illegal purpose;**

(b) *any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.*

(2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

Explanation - The obligation stated in this section continues after the employment has ceased.

Section 126 to apply to interpreters, etc.

127. Section 126 shall apply to interpreters and the clerks or servants of advocates.

Privilege not waived by volunteering evidence

128. *If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and if any party to a suit or proceeding calls any such advocate as a witness, he shall be deemed to have consented to the disclosure, only if he questions the advocate on matters which but for such question he would not be at liberty to disclose.*

Confidential communications with legal advisers

129. *No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose*

A *any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.*

(emphasis added).

[60] I am not able to strike out this suit on the ground that the defendant lawyers are bound by legal privilege under s. 126(1) EA for the following reasons:

B

(a) The purpose of legal professional privilege has been explained by the judgment of Ong Hock Thye CJ (Malaya) in the Federal Court case of *Public Prosecutor v. Haji Kassim* [1971] 1 LNS 109; [1971] 2 MLJ 115, at 116, as follows:

C

The only relevant provision in our Evidence Ordinance excluding professional confidences is section 126, which states that no advocate and solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him and in the course of his employment as such. This rule is founded on the principle that the conduct of legal business without professional assistance is impossible and on the necessity, in order to render such assistance effectual, of securing full and unreserved intercourse between the two.

D

(emphasis added)

I will discuss later in this judgment that pursuant to ss. 126 to 129 EA there are three legally privileged matters (three legally privileged matters) and three exceptions to legal privilege (three exceptions). The effect of legal privilege is purely evidential and concerns solely the admissibility of three legally privileged matters and/or the application of the three exceptions (if any) in respect of the relationship between a practising advocate and solicitor (A&S) and the A&S's client.

E

F

I am of the view that the purpose and solely evidential effect of legal privilege is to facilitate the efficacious conduct of legal business between A&S and the A&S's client. The purpose and effect of such a privilege is not to provide a defence against a civil suit to the A&S and the A&S's client. If the A&S and the A&S's client cannot rely on legal privilege as a defence to a civil suit, a *fortiori*, the A&S and the A&S's client cannot rely on such a privilege to strike out an action. This is the first ground for not acceding to the submission for the defendant lawyers. All the cases cited by both learned counsel for the defendant lawyers do not concern striking out of suits based on legal privilege:

G

H

(i) *Buttes Gas and Oil Co*, at p. 228, concerned a discovery application;

(ii) in *Barbara Lim Cheng Sim*, at pp. 320-321, Su Geok Yiam J decided an application by the plaintiff to:

I

(1) compel the defendants to produce an "Employment Audit Report" (EAR); or

(2A) alternatively, to disallow the defendants from referring to the EAR in their defence, their documents in the "Common Bundle of Documents" and the witness statements of the defendants' witnesses; and

(2B) to compel the defendants to amend their defence so as to delete all references therein to the EAR (failing which the defence would be struck out by the court).

It is to be noted that the High Court in *Barbara Lim Cheng Sim*, at pp. 338 and 340, has held that four English cases, including *Buttes Gas and Oil Co*, do not apply in Malaysia which has ss. 126 to 129 EA and the Federal Court case of *Dato' Anthony See Teow Guan*;

(iii) in *Dato' Anthony See Teow Guan*, at pp. 21-22:

(1) during the trial of a defamation suit, the respondents (plaintiffs) called an A&S as a witness and in the course of examination of the A&S, the respondents sought to admit a legal opinion given by the A&S. The A&S claimed that she was unable to answer any question regarding the legal opinion on the ground of legal privilege under s. 126(1) EA;

(2) the learned trial judge, James Foong J (as he then was) held a "trial within a trial" (TWT) to determine the admissibility of the legal opinion and the communication between the A&S and her client. At the end of the TWT, the High Court decided that the A&S could not be compelled to disclose the legal opinion and legally privileged communication with her client (High Court's decision in TWT);

(3) the respondents appealed to the Court of Appeal against the High Court's decision in TWT. The Court of Appeal reversed the High Court's decision in TWT on the ground that the appellant (defendant) had waived the confidentiality and legal privilege attached to the legal opinion; and

(4) the Federal Court restored the High Court's decision in TWT.

It is clear that there was no application in *Dato' Anthony See Teow Guan* to strike out the defamation suit based on legal privilege;

(iv) in *Re Sarah C Getty Trust*, at pp. 957-958, there was an application to the English High Court to compel a solicitor, Mr Vanni E Treves, to answer certain questions relating to a trust case pending in the Supreme Court of California (SCC) certified by an examiner of SCC pursuant to letters rogatory issued by SCC to the English High Court. *Re Sarah C Getty Trust* did not concern an application by a practising solicitor to strike out an action based on legal privilege;

(v) in *Re Konigsberg*:

(1) a solicitor acted for the bankrupt husband and wife to transfer a freehold property (held in the joint names of the husband and wife) to the wife alone (transfer);

(2) the trustee in bankruptcy (trustee) applied to court to set aside the transfer under the then applicable Bankruptcy Act 1914 (Trustee's Application);

(3) the wife affirmed an affidavit to oppose the trustee's application by alleging that the transfer was for valuable consideration;

(4) the solicitor affirmed an affidavit on behalf of the trustee and contradicted the wife's assertion that the transfer was for valuable consideration (solicitor's affidavit); and

(5) the wife applied to court to exclude the solicitor's affidavit and the exhibits thereto from being used in the trustee's application.

There was no application to strike out a suit based on legal privilege in *Re Konigsberg*; and

(vi) there is no written judgment delivered by the English Court of Appeal in *Knaresborough and Clare Banking Co Ltd*. There is only a case note or case digest of the court's decision in *Knaresborough and Clare Banking Co Ltd*. Courts should be cautious in respect of case notes or case digest. I refer to the Federal Court's judgment given by Suffian LP in *Datuk Hj Harun Hj Idris v. PP* [1976] 1 LNS 19; [1977] 2 MLJ 155, at 170, as follows:

> *The full judgment in Heah Chin Kim [1954] MLJ xxxiii is not available and it is impossible for us to determine its ratio decidendi.*
>
> (emphasis added).

As there is no written judgment delivered in *Knaresborough and Clare Banking Co Ltd*, I am unable to extract any *ratio decidendi* of that case to assist me in this matter;

(b) the second ground for not accepting the aforesaid submission by the defendant lawyers is this – if I have struck out this suit against the defendant lawyers by reason of legal privilege, this will open the door for any party claiming marital privilege (s. 122 EA), "affairs of state" privilege (s. 123 EA), "official communications" privilege (s. 124 EA) and privileged information concerning commission of offences (s. 125 EA), to apply to strike out actions filed against these parties based on the aforesaid privileges. Such an outcome is neither just nor desirable;

(c) the question of whether a piece of evidence:

(i) falls within any of the three legally privileged matters (to be inadmissible as evidence); and

(ii) if a matter constitutes any one of the three legally privileged matters, whether any one or more of the three exceptions apply (which will admit the matter as evidence) A

(admissibility issue) should be decided at the trial based on oral evidence and after parties have been given a right to test the veracity of such oral evidence by way of cross-examination (third ground). B

Before I discuss further the third ground, the three legally privileged matters as provided in s. 126(1) EA have been explained in *Skandinaviska*, at para. 32, as follows:

(1) any communication made by an A&S's client to the A&S, cannot be disclosed by the A&S; C

(2) an A&S shall not state the contents or condition of any document with which the A&S has become acquainted in the course and for the purpose of the A&S's professional employment; and D

(3) an A&S shall not disclose any advice given by the A&S to the A&S's client in the course and for the purpose of the A&S's professional employment.

In *Toralf Mueller v. ALCIM Holding Sdn Bhd & Ors* [2015] AMEJ 1432, at para. 75(c), based on existing Malaysian case law, I have described the three exceptions as follows: E

(i) the first exception is when the A&S's client has expressly consented to the disclosure of three legally privileged matters as provided in s. 126(1) EA (unless with his client's express consent); F

(ii) proviso (a) to s. 126(1) EA provides for the second exception, namely, when the legal communications is made in furtherance of any illegal purpose; and

(iii) the third exception as stated in proviso (b) to s. 126(1) EA applies when the A&S has observed any fact in the course of the A&S's employment which shows that a crime or fraud has been committed since the commencement of the A&S's employment. G

An appeal to the Court of Appeal has been filed against my decision in *Toralf Mueller* and this appeal is still pending. H

The third ground has been explained by Nallini Pathmanathan J's (as she then was) judgment in *Berjaya Land Bhd*, at pp. 366, 367, 368 and 369-370 as follows:

[23] *In so far as this court is concerned therefore one of the issues to be determined by this court at trial will be whether the privilege prevails, or is lifted by reason of the communication having been made for an illegal purpose. Two matters arise for consideration here. They are:* I

A (i) **Was the communication issued in furtherance of an illegal purpose?**

(ii) Who is the material witness to assist the court to ascertain this issue?

B [24] The issue of whether the communication was issued in furtherance of an illegal purpose requires a consideration of the contents of the email.

[25] *It also needs to be considered whether this court should or can, at this interlocutory stage, determine this issue summarily rather than at trial. …*

C ...

[28] *As such the issue before the court is whether or not the privilege and thereby confidentiality that exists in respect of solicitor-client communications is lifted by reason of an illegal purpose. In order to decide whether the purpose is illegal or otherwise, is it permissible for this court to determine that issue on a perusal of the 2nd email and on the basis of the affidavits and submissions filed by the* D *parties? Is the court to make a determination of whether or not the 2nd email was made or written in furtherance of an illegal purpose at this interlocutory stage in a summary fashion on the basis of conflicting affidavits?*

...

E [33] *… But the issue here is whether it is permissible or indeed prudent for this court to come to that conclusion via this application. The proper forum and time for this contention to be taken, it seems to me, is at trial.*

...

[35] *It appears to this court that the most appropriate course to adopt would* F *be for the solicitor to attend as a witness pursuant to the subpoena and to invoke the privilege under s. 126 of the Evidence Act 1950, at that stage. It would then be open to the parties to take up the arguments now set out and for the court to make a determination then. The court might well allow or disallow certain questions in order that it may determine the legality or otherwise of the 2nd email. The court will then be in a position to make a ruling on the matter more fully.*

G ...

[37] **In summary it appears to this court that:**

(a) *The primary issue in this case in relation to the confidentiality of the email turns on whether or not the proviso to s. 126 EA is applicable;*

H (b) The solicitor is the material witness for the purposes of the determination of this issue. As such the materiality requirement as set out in Wong Sin Chong v. Bhagwan Singh (above) is satisfied;

(c) *The issue of whether or not the proviso is applicable ought not to be dealt* I *with at this interlocutory stage in a summary fashion on the basis of conflicting affidavits, but at trial;*

(d) *Section 126 EA envisages the taking up of the issue legal privilege at or during trial. It is not an issue that is normally litigated or dealt with on affidavit evidence (see s. 2 EA). If the court were to make a finding that the proviso is inapplicable on the basis of affidavits, the court would be effectively conducting a mini trial on affidavit evidence, which flouts the EA. The proper course would be for the subpoenaed witness to invoke the privilege afforded by the section at trial. (See also Dato' Anthony See Teow Guan v. See Teow Chuan & Anor. [2009] 3 CLJ 405 where PW1, a solicitor, took the stand and invoked the privilege at trial successfully.);*

(e) *If the court were to allow this application to set aside the subpoena, the court would effectively be adjudicating on the issue of the proviso prior to trial. Certainly in so far as the 2nd email is concerned, there would be nothing left to be adjudicated at trial. This too would amount to a breach of natural justice; …*

(emphasis added)

Premised on the above reasons, as the admissibility issue should only be determined at the trial of this suit, the defendant lawyers cannot therefore rely on legal privilege to strike out this suit.

Before leaving this subject, I should comment on the convening of a TWT (during trial) to determine the admissibility issue. In *Dato' Anthony See Teow Guan*, the High Court conducted a TWT (during a trial) to determine the admissibility of a legal opinion under s. 126(1) EA and this decision has been restored by the Federal Court. In *Toralf Mueller v. ALCIM Holding Sdn Bhd & Ors* [2015] AMEJ 1432, at para. 75(i), I held as follows:

75(i) *the court has a discretion to hold a "trial within a trial" (voir dire) to ascertain the admissibility of a piece of evidence which is alleged to be legally privileged*. In the High Court case of *See Teow Chuan & Anor v. Dato' Anthony See Teow Guan* [1999] 4 MLJ 42, at 45, James Foong J (as he then was) held a *voir dire* to determine the admissibility of a legal opinion. *In this case, I had exercised my discretion not to hold a "trial within a trial" as the admissibility of evidence whereby legal privilege had been claimed by the Petitioner, could be easily decided based on the evidence adduced in this case and the parties' submission.*

(emphasis added)

In deciding the admissibility issue during the trial in question, the court has discretion to hold a TWT. As such, any omission to hold a TWT during the trial to decide the admissibility issue, is not necessarily fatal.

Additional Grounds For Not Striking Out This Suit

[61] Besides the above grounds which support a dismissal of the four applications, the following reasons fortify my decision in not striking out this suit:

(a) The plaintiffs have a constitutional right of access to justice by way of this suit under art. 5(1) of the Federal Constitution – *Sivarasa Rasiah*, at pp. 514-515; and

(b) This suit is based on, among others, allegations of fraud, collusion and conspiracy to defraud. If the allegations in the SOC are true, to accede to these four applications, is tantamount to allowing wrongdoers to take advantage of their own wrong (as explained by the Court of Appeal in *Swee Lin Sdn Bhd*, at p. 492).

Result Of Second Inquiry

[62] Premised on the above reasons:

(a) This suit is not scandalous, frivolous or vexatious within the meaning of O. 18 r. 19(1)(b) RC;

(b) The fair trial of this suit will not be prejudiced, embarrassed or delayed under O. 18 r. 19(1)(c) RC; and

(c) This suit does not constitute an abuse of court process so as to attract the application of O. 18 r. 19(1)(d), O. 92 r. 4 RC and/or the court's inherent jurisdiction.

[63] The upshot is that the second inquiry is resolved in the plaintiffs' favour.

Availability Of Recourse For Defendants In This Suit

[64] I have not overlooked Mr Robert Low's submission that if this suit is not struck out, a lawyer (I may add, any party) may be simply sued on a mere allegation of fraud. If the defendants in this suit are able to resist successfully this action with proof of bad faith and abuse of court process on the part of the plaintiffs, the defendants have the following recourse:

(a) the defendants may apply to court under O. 59 r. 16(2) and (4) RC for costs of this suit to be paid by the plaintiffs on an indemnity basis (and not on a standard basis). Order 59 rule 16(2) and (4) RC provide as follows:

> 16(2) Subject to the other provisions of these Rules, the amount of costs which any party are entitled to recover is the amount allowed after determination of costs on the standard basis where:
>
> (a) an order is made that the costs of one party to proceedings be paid by another party to those proceedings;
>
> (b) an order is made for the payment of costs out of any fund; or
>
> (c) no order for costs is required,
>
> **unless it appears to the Court to be appropriate to order costs to be determined on the indemnity basis.**
>
> ...
>
> (4) *On a determination of costs on the indemnity basis, all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Court may have as to whether the costs were*

reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party; and in these Rules, the term "the indemnity basis", in relation to the determination of costs, shall be construed accordingly.

(emphasis added); and

(b) if the defendants have suffered substantial loss and damage due to this suit which exceeds costs payable on an indemnity basis, the defendants have the following options:

(i) to claim for damages for tort of abuse of court process – please see Gopal Sri Ram JCA's judgment in the Court of Appeal case of *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340, at pp. 352 to 356; and/or

(ii) an action for tort of malicious prosecution may be filed – please see Thomson LP's judgment in the Federal Court in *Rawther v. Abdul Kareem* [1966] 1 LNS 154; [1966] 2 MLJ 201, at pp. 203 to 205.

Court's Decision

[65] In view of the above reasons, I am constrained to dismiss the four applications with costs.

[66] In closing, I take this opportunity to express my gratitude to all learned counsel for their persuasive and detailed submission.